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THE MISCELLANEOUS REPORTS.

CASES DECIDED

IN THE

COURTS OF RECORD

OF THE

STATE OF NEW YORK

OTHER THAN THE

Court of Appeals and the Appellate Division of the Supreme Court.

CHARLES C. LESTER, REPORTER.

VOLUME LIII.
1907

J. B. LYON COMPANY, PUBLISHERS,
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* Appointed December 30, 1905, vice George H. Fitts, resigned.
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† Appointed December 5, 1906, vice Morgan J. O'Brien, resigned.

§ Appointed November 28, 1906, vice Daniel J. Kenefick, resigned

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THE

MISCELLANEOUS REPORTS

OF THE

STATE OF NEW YORK.

COMMENCING FEBRUARY, 1907.

HARRY B. DAVIS, Plaintiff, *v.* WILLIAM ROSENZWEIG REALTY OPERATING COMPANY and WILLIAM ROSENZWEIG, Defendants.

(Supreme Court, New York Special Term, February, 1907.)

Motions and orders — Obtaining testimony to be used on motion — In general — Not ordered when useless.

Where, in an action to rescind a contract for the purchase of defendant's land and to recover moneys deposited, the court finds that defendant had falsely represented that the land was firm, natural ground suitable to support buildings, a referee to take depositions for use upon a motion for a new trial will not be appointed where it clearly and positively appears that the persons to be examined will not swear to the facts which defendant seeks to establish.

Where one of the persons whose depositions are sought not only refused to verify a proposed affidavit upon the ground that he had no knowledge of the matters therein contained but also refused to make any affidavit whatever upon the application, the motion as to him will be granted.

MOTION to obtain depositions of certain witnesses.

Morris J. Hirsch, for motion.

Kurzman & Frankenheimer (John Frankenheimer, of counsel), opposed.

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GIEGERICH, J. This is a motion, under section 885 of the Code of Civil Procedure, to obtain the depositions of certain persons, Kashare, Goldberg and Schlessel, to be used upon a motion which the defendant corporation proposes to make for a new trial. The action was brought to rescind a contract made by the plaintiff to purchase certain real estate of the defendant and to recover back the amount deposited on the execution of the contract. The plaintiff was successful; the trial court finding that the defendant had falsely represented to the plaintiff that the land in question was firm, natural ground suitable to support buildings, while in fact it was filled ground and unsuitable. The moving papers show that the plaintiff testified upon the trial that Schlessel had purchased the property of him; that he had it tested and reported to the plaintiff that it was filled ground and that the latter had the land tested and verified that fact. That Schlessel, who was called as a witness in behalf of the plaintiff, testified that, after entering into a contract with the plaintiff for the purchase of the property, he had a digger examine the lots, who reported that the ground was filled ground and that the result of such examination was communicated to the plaintiff by the witness, upon the strength of which the plaintiff rescinded the contract upon the ground of the alleged falsity of the representation. And it is further alleged in the moving papers that since that time Schlessel told Kashare and Goldberg that, the plaintiff being financially unable to take title, it was arranged between them that Schlessel should be relieved of his contract to take the property in suit, and a scheme devised to have the bottom of the ground declared to be made ground and not good ground and assert that representations had been made as to the character of the bottom on behalf of the defendant company to induce the plaintiff to purchase the said property. Schlessel denies that he made any of the statements claimed to have been made by him, and which he says are in direct conflict with his testimony upon the trial, and he further states that the reason why he refused to swear to the proposed affidavit was because all the allegations therein contained after the first page were untrue. Kashare denies that Schles-

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sel ever made to him any of the statements above mentioned, and he further denies having any conversation with William Rosenzweig at Asbury Park, subsequent to the trial, to the effect that Schlessel had entered into a conspiracy with the plaintiff of the character above stated. Kashare further makes affidavit that he never had any conversation with Schlessel relating to the purchase of any property whatsoever from the plaintiff, and that the reason why he refused to swear to the proposed affidavit was because he "knew nothing about the matters therein referred to." Mr. Justice Scott, in Calvet-Rogniat v. Mercantile Trust Co., 46 Misc Rep. 20, 24, passing upon a similar application, said: "The proceeding is not intended to be used as one for the general examination of witnesses, and no good purpose is to be served by putting questions which will elicit denials of the facts sought to be established. The Code expressly vests the granting of this order in the judicial discretion of the court, and it would not, in my opinion, be a proper exercise of that discretion to appoint a referee to take the depositions when it clearly and positively appears, as in the present case, that the parties to be examined will not swear to the facts which plaintiff seeks to establish by their depositions because, as they allege, these facts do not exist. The result of their examination, under these circumstances, would not aid the court in determining the principal motion." All that is above said applies with equal force to the cases of Schlessel and Kashare, and hence the motions as to them should be denied. A different situation, however, is presented in the case of Goldberg, the remaining proposed witness, who refused to verify the proposed affidavit on the ground that he had no knowledge of the matters therein contained, but who, nevertheless, refused to make any affidavit whatever upon this application. His case, therefore, differs from Calvet-Rogniat v. Mercantile Trust Co., *supra,* where the proposed witnesses made positive affidavits that some of the matters proposed to be so proved by them were not true, and that as to others they had no knowledge. It is objected by the plaintiff that, as the main issue upon the trial was whether or not the defendant William Rosenzweig represented that

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the lots in suit were good and not made ground, and as Schlessel gave no testimony on that point, it would be unavailing to discredit him. This argument loses sight of the fact that the evidence sought would not only discredit Schlessel by showing a conspiracy between him and the plaintiff to relieve the latter of the contract in suit by false testimony, but would equally discredit and refute the plaintiff, who did testify to the main issue. Neither do I think that there has been any such laches on the defendants' part as to constitute a bar to this motion. The facts were discovered several months ago, but were not made known to the defendants' attorney because their importance was not appreciated. It does not appear that there was any delay after the attorney learned the facts, but the contrary rather, as he states in his affidavit that they were just related to him. The motion as to Goldberg is, therefore, granted, but denied as to Schlessel and Kashare, with ten dollars costs to abide the final event of the action. The appointment of a referee to take the deposition of Goldberg, as well as the time and place of his examination, will be deferred until the settlement of the order, which may be had on two days' notice.

Ordered accordingly.

AGNES K. M. MULLIGAN, Plaintiff, *v.* WILLIAM J. O'BRIEN et al., Defendants.

(Supreme Court, New York Special Term, February, 1907.)

Abatement and rivival — Revival or continuation of suits — Death of one of several plaintiffs or defendants — Death of defendant jointly liable.

Where a complaint against three defendants sued jointly alleges a cause of action for unlawful entry and detainer, another for assault and battery and a third for conversion, the first two causes of action abate as to a defendant who dies before judgment but the third cause of action survives and may be continued separately against his executrix.

Upon the decease of one of several defendants jointly liable, the action can only be revived as a separate action against the representative of the deceased defendant; but an order may be made

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herein, severing the action with leave to continue the first two causes of action, separately, against the surviving defendants and with leave to continue the third cause of action, separately, against the executrix of the deceased defendant.

MOTION by the plaintiff to sever the action.

William G. Mulligan, for plaintiff and motion.

Edward C. Moen, for defendant William J. O'Brien, opposed.

Foster & Spier (Frederick P. Foster, of counsel), for defendant Mary M. Barson, as executrix, for motion only, opposed.

GIEGERICH, J. The complaint embraces three causes of action; one for unlawful entry and detainer, another for assault and battery, and still a third for the conversion of personal property. William G. Barson, one of the defendants, having died, a motion is now made to sever the action and for leave to continue it separately against the defendants O'Brien and Charles H. Barson as if they were the only defendants named therein, and for leave to continue the action upon the third cause of action, namely, that for conversion of personal property, separately, against the executrix of William G. Barson, deceased, as if she were the only defendant named therein. There can be no question that the cause of action for conversion of personal property survives (Heinmuller v. Gray, 13 Abb. Pr. N. S. 299); nor that the cause of action for unlawful entry and detainer and that for assault and battery abated as to the defendant William G. Barson, with his death. Moesley v. Albany Northern R. R. Co., 14 How. Pr. 71; Comstock v. Dodge, 43 id. 97. There is no difficulty in holding that this action survives in part and abates in part. Indeed, in Cregin v. Brooklyn Crosstown R. R. Co., 83 N. Y. 595, it was held that, where only one cause of action was stated, there would be a survival in part and an abatement in part as to that single cause of action, and that the administrator of a deceased plaintiff might, accordingly, remain entitled to recover for the loss

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of services of the plaintiff's wife and for expenses incurred by reason of the injuries causing her death, although such an administrator could not recover any damages for the loss of the wife's society, as the right of action for such damages died with the husband. That the action should be severed as to the third cause of action seems to be established by the authorities. In Union Bank v. Mott, 27 N. Y. 633, the court stated that, where parties are jointly and severally liable either for torts or upon contracts, the personal representatives of the deceased parties may be proceeded against by action at the same time with actions against surviving parties, but that it must be by separate actions and not by joining both classes of defendants in one action, and that, upon the decease of one of several defendants thus liable in a joint action, such action cannot be revived as a joint action, but that there is no objection to revivor of the suit in such a case as against a representative of a deceased party as a separate action. To the same effect see Gardner v. Walker, 22 How. Pr. 405. In opposition to the motion various authorities of other jurisdictions are quoted from, but the right of the plaintiff to the relief sought by this motion is in this State governed by statute, the provisions in respect thereto being set forth in sections 758 and 759 of the Code of Civil Procedure.

Motion granted, with ten dollars costs.

JULIUS KRAININ, Plaintiff, *v.* BENJAMIN J. COFFEY, Defendant.

(Supreme Court, Kings Special Term, February, 1907.)

Lis pendens — Commencement and pendency of action and notice — Cancellation of notice — Grounds.

Where the complaint, in an action to recover a deposit made by a vendee on a contract to purchase real estate together with expenses of searching title, alleges no facts showing plaintiff's right to resort to equity or that he has not a full and adequate remedy at law, a *lis pendens* filed in the action will be canceled on motion.

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MOTION to cancel *lis pendens* in an action to recover deposit made by a vendee on a contract to purchase real estate, together with expense of searching title, the complaint asking that the judgment be declared a lien upon the real estate.

J. G. Abramson, for plaintiff.

Alexander A. Forman, Jr., for defendant.

KELLY, J. I do not find any allegation in the complaint justifying a notice of *lis pendens*. The plaintiff does not ask for specific performance; he does not want the property. He says the title is unmarketable. There are encroachments, and as to part of the property defendant has no title. There are no facts alleged or suggested showing why resort is had to equity. Plaintiff did not enter into possession; he does not allege that he has not full and adequate remedy at law. This method of refusing to take title, and then tying up the real estate by a *lis pendens*, without any facts showing plaintiff's right to resort to equity, or that plaintiff has not full and adequate remedy at law, is a branch of litigation which has lately become very marked in its development in the courts. It leads to injustice and oppression and, under the authority of Klim v. Sachs, 102 App. Div. 44, in this department, I think it is improper and should not be countenanced.

Motion granted.

OTTO DOEPFNER, Plaintiff, *v.* LAMONT M. BOWERS, Defendant.

(Supreme Court, New York Special Term, February, 1907.)

Injunction — Who and what may be enjoined — Interference with property rights by private persons — Possession and use of premises. Landlord and tenant — Extensions, renewals, etc. — Option to renew — Notice of intention.

Equity will relieve a tenant from the consequences of his failure to comply with a condition requiring notice in a covenant for the renewal of his lease where it appears he has given a fair intimation of his intention to renew and no injury has been done to the other party.

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Where a tenant had occupied premises for business purposes for nearly ten years, under a lease containing a covenant for an extension of five years more, had expended a large sum in fitting up the premises for his business and had built up a valuable business there and, being unexpectedly in a foreign country on the day when the terms of the lease required notice of his intention to renew to be given, gave notice eighteen days later, the day after his return to this country, the landlord having suffered no injury from the delay, held, that equity would relieve the tenant from the consequences of his omission to give notice on the day named in the lease and, in a suit to restrain the landlord from interfering with his property, that an injunction *pendente lite* should be granted.

MOTION for a temporary injunction.

Arthur F. Cosby, for motion.

Howland, Murray & Prentice (George Wellwood Murray, of counsel), opposed.

GIEGERICH, J. The plaintiff, a tenant, moves for an injunction *pendente lite* restraining the defendant, his landlord, from interfering with his possession of the premises in suit. The facts necessary to be stated are as follows: The plaintiff is a druggist conducting business at the northwest corner of Thirty-fourth street and Lexington avenue, in the borough of Manhattan, which premises he occupies under a lease having a term of ten years from the 1st day of May, 1897, at a yearly rental of $2,000, which lease contains a covenant that the lessor will extend the same for a further period of five years from the date of its expiration, at a yearly rental of $2,200, provided that the lessee has fully complied with all the covenants of the lease and given notice in writing on or before six months prior to the date of the expiration of the lease of his intention to take advantage of such option. The plaintiff shows in his moving papers that he expended the sum of $5,000 in fitting up the premises with shelving, counters, a show case, soda fountain and other necessary drug store equipment and has built up a good will which he estimates at the value of at least $10,000, all in the belief and expectation that he would be able to carry on

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the business for the renewal period of five years. By the terms of the lease possession was to begin on May 1, 1897, but the premises were not ready for occupancy and the plaintiff did not take possession or pay rent until June first. On November 1, 1906, the date on or before which written notice of election to renew should have been given, the plaintiff was in Germany, whither he had gone in July, expecting to return on October first, but owing to difficulty in securing return passage and for other reasons he did not return until November eighteenth, and on the following day, November nineteenth, he served notice in writing of his option to renew. The defendant refused to grant the renewal at a rental of $2,200 as specified in the lease, but demanded instead $3,400 for the first three years, $3,800 for the next three and $4,000 for the third three years; or an annual rental of $3,600, which rates the defendant and his agents state are the same or lower than offers made for the premises by others than the plaintiff. The plaintiff rests his case upon the special facts and circumstances and the equitable power of the court to relieve against forfeiture and the consequences of mistake and inadvertence. I am of the opinion, upon the facts shown in this case, that the plaintiff is entitled to relief. There is some excuse for his failure to give the written notice required by the lease, and it does not appear that the defendant has in anywise been injured by the short delay in giving such notice. In New York Life Ins. & Trust Co. v. Rector, 12 Abb. N. C. 50, which was a case quite similar to this, the court said (p. 52): "The plaintiff was evidently misled by the recital in the assignment into the belief that the lease did not expire until December 30, 1881. In the absence of any express intention on its part, it cannot be reasonably presumed that the plaintiff would knowingly surrender so valuable an interest as it had in this lease without adequate compensation. Neither should its honest mistake of a fact, under all the circumstances, be regarded as laches." In McAdam on Landlord and Tenant (3d ed., § 155, p. 542), the following rule is stated: "Equity will relieve a lessee who fails to comply with a condition respecting notice, in a covenant for the renewal of his lease

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and compel specific performance thereof, where it appears that he has given a fair intimation of his intention to renew, and no injury has been done to the other party; but not where there has been gross laches, or where the neglect was willful, and a condition requiring written notice may be dispensed with on like grounds." As before stated, I do not think it could fairly be said that the plaintiff was guilty of gross laches or of willful neglect. I am of the opinion, consequently, that the injunction *pendente lite* should be issued, but only on terms that will protect the defendant in the event of his success upon the trial. It is evident that the amount of security should be large, because of the great difference in the amount of the rental provided in the lease and the amount which it is undisputed the defendant could receive if free to rent the premises to a new tenant or to make an entirely new agreement with the plaintiff. The amount and terms of such security will be determined upon the settlement of the order.

Ordered accordingly.

HORACE A. TERRY, Plaintiff, *v.* HENRY W. GREEN, Defendant.

(Supreme Court, Herkimer Special Term, February, 1907.)

Injunction — Preliminary injunction — Papers on motion for injunction — Sufficiency of affidavit without complaint.

Although the failure of the affidavit upon which a preliminary injunction was granted to state whether any previous application has been made for the order asked and the failure of the injunction to state the grounds upon which it was granted are mere irregularities which the court might disregard, the fact that the affidavit was not made by the plaintiff and that no excuse for his failure to make the same was shown, in connection with the fact that the affidavit is largely the conclusions of the attorney who made it and not statements of his personal knowledge nor of the sources of his information, and the injunction was not founded upon the summons and complaint, it should be vacated upon defendant's motion.

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MOTION, by defendant, to vacate injunction order.

A. P. Brown, for motion.

G. Garrett Robinson, opposed.

DEVENDORF, J. This motion is made upon the plaintiff's papers to vacate an injunction order granted herein; the ground of the motion is the infirmity of the affidavit upon which the order was granted. The following defects or irregularities appear:

The application for the injunction was made *ex parte* on an affidavit which failed to state whether any previous application had been made for such injunction. There is no venue in the affidavit. The affidavit was not made by the plaintiff, and no excuse for his failure to make the same was shown. The injunction order does not mention the summons and complaint and, if the complaint was used on the motion for the injunction, then, all the papers used or read on the motion were not specified in the injunction order according to Rule III, Supreme Court; neither does the order recite the grounds for the injunction. The undertaking, executed in Otsego county, was not authenticated by the certificate of the clerk of that county and, hence, not proved as a deed to be recorded in Oneida county, where the venue of the action is laid.

Rule XXV of the Supreme Court provides that the affidavit should state whether any previous application has been made for the order asked, but this is an irregularity which the court could disregard. Bean v. Tonnelle, 24 Hun, 353; Pratt v. Bray, 10 Misc. Rep. 445; Skinner v. Steele, 88 Hun, 307.

Failure to state grounds for the injunction, as required by section 610, Code of Civil Procedure, is also an irregularity and could well be disregarded by the court if the injunction order were granted on a sufficient, verified complaint and affidavit, if copies thereof were served on the defendant with the order. Church v. Haeger, 33 N. Y. Supp. 47.

The fact that the affidavit upon which the injunction order

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was granted was not made by the plaintiff, and no excuse for his failure to make the same shown, presents a more serious question. The attorney does not state in this case any reason why the plaintiff did not make the affidavit. The affidavit is largely made up of conclusions and cannot be deemed, in that regard, to contain a statement of the attorney's personal knowledge; but, rather, the plain inference is that such attorney has not personal knowledge of the facts as to which he affirms. Crowns v. Vail, 51 Hun, 204.

I think the objection that the affidavit is fatally defective, not only in substance, but from the fact that it is made by the attorney and no reason given why it was not made by the plaintiff, is well taken. Talbert v. Storum, 21 N. Y. Supp. 719; Pach v. Geoffroy, 19 id. 583; Clark v. Sullivan, 8 id. 565.

As stated, some of the defects in the plaintiff's papers used on the application for the injunction order herein, could be passed over as irregularities; but, it appearing that the only paper referred to and mentioned in the injunction order, and on which it appears to have been based, is the affidavit of the plaintiff's attorney, and no reason being given why such affidavit was not made by the party, and the affidavit being necessarily largely upon information and belief, without stating the source and failing in itself to be full and complete as to the necessary facts containing the alleged cause of action, and the grounds for the injunction not being recited, either in the injunction order or in the affidavit, and the summons and complaint not being made a part of the proceedings are grounds for the vacating of the injunction, so serious that they cannot be overlooked or disregarded by the court.

For the reasons above stated, I have come to the conclusion that the papers upon which the injunction order was obtained are entirely insufficient and such order must, therefore, be vacated and set aside. An order will enter accordingly, with ten dollars costs to the defendant, to abide the event.

Ordered accordingly.

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MEYER R. BIMBERG, Plaintiff, v. LINCOLN H. WAGENHALS et al., Defendants.

(Supreme Court, New York Special Term, February, 1907.)

Receivers — Nature, grounds and subjects of receivership — Particular actions and proceedings — Actions affecting partnerships.
Code of Civil Procedure, § 713.

Where an action is brought for the dissolution of an alleged partnership and the appointment of a receiver, and the existence of the partnership is denied, and there is a serious conflict with respect to the transactions and statements of the parties, from which their intentions and the nature of the agreement between them must be determined, and facts are not stated from which danger may be apprehended that the profits of the business will be appropriated by the defendants who are managing it or dissipated, and there are no averments of fraud, mismanagement or dissipation of assets, and the defendants are financially responsible and the circumstances indicate that the successful management of the business requires that the defendants should remain in charge, the case has not been brought within the provisions of section 713 of the Code of Civil Procedure relating to the appointment of receivers; and plaintiff's motion for a receiver should be denied.

MOTION by the plaintiff for the appointment of a receiver before judgment.

Putney, Twombly & Putney (Henry B. Twombly, of counsel), for motion.

Sullivan & Cromwell (William J. Curtis and Royall Victor, of counsel), opposed.

GIEGERICH, J. This is a motion by the plaintiff before judgment for the appointment of a receiver of alleged partnership property and effects. It appears from the motion papers that the defendants, by an instrument dated September 5, 1905, obtained from the Longacre Square Theatre Company a lease for a term of years of the Astor Theatre,

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situate at the northeast corner of Broadway and Forty-fifth street, in the borough of Manhattan. Subsequently, the parties litigant entered into an agreement, bearing date the 8th day of September, 1905, whereby the defendants assigned to the plaintiff among other things a one-third interest in and to the lease above mentioned upon certain terms and conditions, among which is the contribution by each of the parties of certain sums of securities at specified times "as part capital for the operation of the said theatre and business." The agreement further provides for the division of profits and the sharing of losses, and for the withdrawal by the defendants of a certain sum yearly for the services to be rendered by them in managing and conducting the said theatre and business connected therewith. The agreement also contains clauses to the effect that the defendants shall have the sole management and control of the theatre and the business connected therewith and that the plaintiff shall have no voice in the management or control thereof, but that if any production is given at the theatre in which the defendants have an interest the theatre shall receive a stipulated percentage of the receipts; that the defendants "shall have the exclusive handling of all moneys and all the finances in connection with the said theatre and business;" that books of account shall be kept by the defendants, with the privilege to the plaintiff of access thereto at reasonable times and that the defendants should also deliver to him a weekly statement in writing showing receipts and itemized disbursements thereof for the current week, and that "each of the terms and covenants in this agreement shall operate as a condition, and on a breach thereof by either party the other shall have the right to terminate this agreement on written notice." The agreement does not provide a limitation for the continuance thereof. The defendants, in January, 1907, gave written notice of the termination of the agreement, because of the plaintiff's alleged breach, and tendered back a certain sum paid by him at the time of the execution of the agreement. The plaintiff then brought this action for a dissolution of the alleged copartnership, alleging in the complaint performance of all conditions of the agreement on

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his part, the defendants' refusal to permit him to inspect the books of account of the theatre or to have any access thereto, and to furnish him with an account of all profits and losses, if any, and that the defendants have attempted to repudiate the agreement of copartnership. The answer denies the existence of the alleged copartnership and generally the averments of the complaint as to the defendants' liability to account to the plaintiff, and further sets up failure to perform on plaintiff's part; the cancellation of the agreement by the defendants in the manner provided by its terms, on account of plaintiff's alleged breach; and, as a third defense and also as a counterclaim, it alleges misrepresentations made to the defendants by the plaintiff at the time of the execution of the agreement and asks for its cancellation by reason thereof. The defendants resist the motion for the appointment of a receiver upon the ground that the agreement in suit shows upon its face that it merely assigns an undivided interest in the lease and does not create a partnership. The plaintiff, on the other hand, insists that the agreement contains all the elements of a partnership and that it cannot be construed otherwise. While the latter view appears to find considerable support from the language of the instrument, it is claimed by the defendants that the parties themselves did not intend to create a partnership. In support of such contention the defendants produce the affidavit of Mr. I. N. Jacobson, who was the attorney for the defendants during the negotiations and in the drafting of the agreement, and the affidavit of the defendant Wagenhals stating that the defendants rejected a draft agreement submitted by the plaintiff, which contemplated a partnership arrangement, upon the ground that they would not enter into that relationship with him. These allegations are denied by the replying affidavits of the plaintiff and Mr. William Grossman, who represented him in the preparation of the agreement, the plaintiff alleging that he was not informed at any time that there was any question whether or not there should be a partnership under the agreement, but that the question at issue was simply as to the form of said agreement of partnership. Mr. Grossman in his affidavit says that the only question that arose

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between Mr. Jacobson and himself was with regard to the terms of the agreement of partnership, and that several drafts were prepared before the terms were finally settled. It is well established that, in determining whether it was the intention of the parties to become partners, the court must look at the agreement as explained by their own transactions and statements. Heye v. Tilford, 2 App. Div. 346, and citations; affd., 154 N. Y. 757. As above seen there is a serious conflict with respect to the transactions and statements of the parties during the times mentioned, and this I find it impossible to determine upon affidavits. Such determination must, therefore, await the result of the trial. The existence of the partnership being left in doubt, a receiver should not be appointed (Goulding v. Bain, 4 Sandf. 716; McCarty v. Stanwix, 16 Misc. Rep. 132; Day v. Dow, 46 App. Div. 148; Kirkwood v. Smith, 64 id. 615; 72 id. 429; 23 Am. & Eng. Ency. of Law [2d ed.], 1021), unless the plaintiff has complied with certain prerequisites to the appointment of a receiver in cases other than where the partnership is not disputed. The moving affidavit alleges "that the defendants have refused absolutely to give any information whatsoever about the business conducted in said Astor Theatre and are conducting business solely for their own account without any reference to deponent; that in deponent's belief said theatre is making money, and, unless a receiver is appointed to collect and conserve the profits of said business, such profits will all be appropriated by the defendants and dissipated." It will be observed that no facts are set forth in support of the plaintiff's belief and fear regarding the matters so mentioned, and as they are mere conclusions they have been disregarded. Although the complaint alleges more specifically in what respects the defendants failed to give plaintiff any information respecting the business of the alleged copartnership, neither the complaint nor the affidavits contain any averments whatever of fraud, mismanagement or dissipation of assets upon the part of the defendants. So far as the financial responsibility of the defendants is concerned, it appears from their affidavits, without contradiction on the part of the plaintiff, that they are both abundantly able to

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satisfy any judgment which may be rendered against them in this action. It is further alleged in the opposing affidavits that possession of the theatre was obtained by the defendants on September 21, 1906; that up to the present time no net profits have been obtained from its operation; that the leasehold in suit is held subject to the payment of quarterly rent of $10,000 and that the lessor will have the right of entry upon the failure to promptly pay such rent; that the defendants would be irreparably and immeasurably damaged if the management of the theatre were taken out of their hands at this time by the appointment of a receiver; that they have contracts with other parties for the occupation of the theatre for theatrical performances for about ten weeks in advance of the present date and that they have numerous negotiations now pending with other parties for the occupation of the theatre after that time; that the successful management of the property requires that the defendants should remain in charge, and that it was this reason principally which led them to insist at the time of the execution of the agreement that they should have the exclusive and absolute management and control of the property. Subdivision 1 of section 713 of the Code of Civil Procedure provides that a receiver may be appointed "Before final judgment, on the application of a party who establishes an apparent right to, or interest in, the property, where it is in the possession of an adverse party, and there is danger that it will be removed beyond the jurisdiction of the court, or lost, materially injured, or destroyed." It has been held that these provisions are exclusive, so far as they cover the subject, and an application for the appointment of a receiver is subject to their limitations. Colwell v. Garfield Nat. Bank, 119 N. Y. 408; Dazian v. Meyer, 66 App. Div. 577. In Colwell v. Garfield Nat. Bank, *supra,* the court construing section 713 of the Code, at page 413, said: "The power of the court is we think limited by that section, and it must proceed in the manner pointed out thereby, or else its orders will be void." And in Dazian v. Meyer, *supra,* it was said (p. 577): "Since the adoption of the Code, the appointment of receivers is regulated by the provisions of sections 713 and 714, which are exclusive so

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far as the provisions cover the subject (Colwell v. G. N. Bank, 119 N. Y. 408)." Tested by these authorities, it is manifest that the moving papers are wholly insufficient to authorize the appointment of a receiver. As above noted, there is an entire absence of competent legal proof showing either fraud, mismanagement or dissipation of funds upon the part of the defendants, or that the plaintiff will suffer irreparable injury unless a receiver is appointed. In other words there is a total failure of the proof requisite to the appointment of a receiver, viz., danger that the property in suit will be removed beyond the jurisdiction of the court, or lost, materially injured or destroyed. The motion for a receiver is, therefore, denied, with ten dollars costs.

Motion denied, with ten dollars costs.

DANIEL LEROY DRESSER, Plaintiff *v.* THE MERCANTILE TRUST COMPANY et al., Defendants.

(Supreme Court, Nassau Special Term, February, 1907.)

Place of trial — Residence or domicile of parties — What constitutes residence.

Where, on a motion to change the place of trial on the ground that plaintiff did not reside in Nassau county where he laid the venue, the only statements are that for several years plaintiff's name has appeared in Trow's New York City Directory with a house address in said city, and that, in a petition in a legal proceeding, he stated that his permanent residence was in said city, but stated in an affidavit in the present motion, in explanation, that he did not mean he had changed his domicile or legal residence from Nassau county but that he would remain in said city and in the jurisdiction of the court in which the petition was made; and where it appears that the plaintiff formerly had a legal residence in Nassau county before he took an apartment in New York city and he states he had retained his domicile there and intended his occupation of an apartment in New York to be temporary and it appears he had continued to vote in Nassau county, and, before the commencement of the present action, had

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surrendered his apartment, dismissed his servants and moved his furniture back to Nassau county where he had frequently been since, held, that plaintiff must be deemed to have resided in that county within the meaning of section 984 of the Code of Civil Procedure when the action was commenced.

Two motions are made by different defendants upon the same or like affidavits for an order directing the change of the place of trial of this action from Nassau county to New York county, upon the ground that the plaintiff, Daniel LeRoy Dresser, was not, at the time of the commencement of this action, and is not now a resident of Nassau county, but that he was at that time and is now a resident of New York county. One of these motions is made by the defendants, The Mercantile Trust Company and Krech, and the other by the defendants McCook, Alexander, Gulliver and Deming.

Alexander & Colby (William F. Goldbeck, of counsel), for motion of defendants Mercantile Trust Company and another.

William C. Prime, for motion of defendants McCook and others.

Frank Sullivan Smith (Frederic W. Frost, of counsel), opposed.

SCUDDER, J. The defendants in support of their motions claim that plaintiff was a resident of the city and county of New York and not a resident of the county of Nassau at the date of the commencement of this action, November 26, 1906. To sustain their contention that plaintiff was a resident of New York city on that date, it was a matter of the first importance for defendants to offer some evidence that plaintiff had or maintained at that time some establishment or dwelling place in that city. The only statements in reference thereto which are contained in the affidavits submitted in support of the motion are found in the affidavit of one Darroe. This deponent avers that he examined Trow's New York City Directory for several years and that, in said directory for 1903, the house address of the plaintiff

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was given at Oyster Bay, L. I.; in that of 1904, at 44 East Fiftieth street, and in that of 1905, and also that of 1906, at No. 30 Central Park, south. The bare statement in the city directory of 1906 that plaintiff's house address was at 30 Central Park, south, in no way tends to establish the fact that plaintiff had or maintained a place of abode at that address in November, 1906. The defendants could readily have ascertained the fact by inquiry at that address, but they do not seem to have done so or, if they did, the result of the inquiry is not told in any affidavit which they have submitted.

The only other matter in defendants' affidavits which bears on the question of plaintiff's residence in New York city is the fact that the plaintiff, in a petition in bankruptcy proceedings to cancel a certain order of arrest, verified July 6, 1906, stated that "his permanent residence" was in the city of New York. The plaintiff in his affidavit states that the phraseology of the petition was prepared by his attorney; that he did not intend by the phrase above quoted, nor did his counsel intend thereby, nor did the opposing counsel understand that it was intended thereby, to convey the idea that plaintiff had changed his domicile or legal residence from Oyster Bay to New York county, but only that plaintiff would remain within the county of New York and the jurisdiction of the Bankruptcy Court. This explanation is supported by the affidavit of plaintiff's attorney in the bankruptcy proceeding and the affidavit of the attorney who procured the order of arrest. Under these circumstances, the phrase used in the petition cannot be regarded as conclusively establishing that the residence or domicile of the plaintiff was in the city of New York.

From the affidavits submitted, there can be no question but that, prior to the time when the plaintiff took an apartment in the city of New York, which appears to have been in July, 1903, plaintiff had established his legal residence or domicile at Oyster Bay in Nassau county. The taking of an apartment in the city of New York and the occupancy thereof by the plaintiff for about three years would not of itself effect a change of his domicile, unless accompanied by

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an intention to abandon his domicile at Oyster Bay and to acquire another in New York. De Meli, v. De Meli, 120 N. Y. 485; Dupuy v. Wurtz, 53 id. 556.

The plaintiff asserts in his affidavit that his domicile has continuously been at Oyster Bay, and that his occupancy of the apartment in New York was only intended to be temporary. The assertion is supported by averments of various declarations and sworn statements which plaintiff made at various times, during the period of his occupancy of the New York apartment, that he resided at Oyster Bay. It is also shown that plaintiff voted at Oyster Bay at the public elections in the years 1904 and 1906. It further appears that, on or about October 1, 1906, before the commencement of this action, plaintiff surrendered his lease of the New York apartment and dismissed his servants; that the furniture was removed to Oyster Bay and that plaintiff was frequently in the village of Oyster Bay during October and November, 1906. It does not appear, however, from plaintiff's affidavit, where his place of abode in Oyster Bay, if any, was during these months.

It is to be borne in mind that the burden of proof on this motion is on the defendants to establish satisfactorily that plaintiff had no residence in Nassau county at the time when this action was commenced. Bischoff v. Bischoff, 88 App. Div. 126, 127.

Defendants claim that at that time the plaintiff actually resided in the county of New York. This claim is not supported by sufficient affidavits, and is refuted by plaintiff's affidavit that he abandoned his New York apartment on October 1, 1906.

The question here presented is not whether the plaintiff had the choice of bringing the action in the county of his domicile, or in a county where he actually resided, or whether such choice would be permissible under section 984 of the Code of Civil Procedure. So far as the facts are disclosed by the affidavits, the plaintiff did not reside or have a place of abode in the city of New York when the action was commenced. At that time, however, he claimed and had a domicile in Nassau county, and it is not shown that he also

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had an actual residence or place of abode in any other county. Under these circumstances, plaintiff must be deemed to have resided in Nassau county, within the meaning of section 984 of the Code of Civil Procedure, when the action was commenced.

Motion denied, with costs.

FRANCISCO MOLE, Plaintiff *v.* THE NEW YORK, ONTARIO & WESTERN RAILROAD COMPANY, Defendant.

(Supreme Court, Orange Special Term, February, 1907.)

Place of trial: Residence or domicile of parties — Corporations — Railroad company; Change of place of trial; Affidavits on motion — Probability that witnesses will testify as stated; Convenience of witnesses — What witnesses considered — Employees and experts.

In an action to recover damages for personal injuries against a railroad company, the place of trial is properly laid in a county through which its road is operated, in which it owns property and has a place for the regular transaction of business.

Upon a motion to change the place of trial for the convenience of witnesses, affidavits which state that the moving party expects to prove certain facts by the witnesses named, without stating or disclosing grounds showing that such facts can be proved by them, are insufficient.

And where it appears that the plaintiff is a poor man and would be unable to transport his witnesses to the county where the accident happened and to which the place of trial is sought to be changed, and defendant's witnesses are all its employees except the expert witnesses, and to change the place of trial would practically defeat the plaintiff's cause of action, such change will not be ordered.

MOTION to change the place of trial.

Martin T. Manton, for plaintiff.

Howard D. Newton, for defendant.

MORSCHAUSER, J. This motion is made by the defendant to change the place of trial upon the ground of convenience of witnesses and that the county designated, viz., Orange county, is not the proper county, and that the same should

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be changed to Oneida county, the county wherein plaintiff was injured.

Plaintiff sustained the injuries at South Loop, Oneida county, this State, while he was employed by defendant upon a work train on defendant's railroad. The negligence and injuries are denied by the defendant.

In the affidavit stating the names of the witnesses who will be convenienced by a change of the place of trial, it is simply stated that the moving defendant expects to prove certain facts by the witnesses named, but it is nowhere stated that those facts can be proven by those witnesses, nor does the affidavit disclose grounds showing that the facts can probably be established by the persons designated and it is insufficient. Lyman v. Gramercy Club, 28 App. Div. 34; Hayes v. Garson, 25 id. 115; White v. Hall, 8 id. 618.

It further appears that the plaintiff is a poor man and the change of the place of trial to Oneida county would practically defeat his cause of action, as nearly all the witnesses for the defendant are its employees except the expert witnesses. This is a sufficiently controlling consideration to deny the change of place of trial. The plaintiff, being in poor financial circumstances, would be unable to transport his witnesses to Oneida county; and this is a case where the location of the happening of the accident should not control. Tuthill v. Long Island Railroad Co., 75 Hun, 556.

The convenience of expert witnesses is not consulted in deciding the question as to changing the place of trial. Adriance, Platt & Co. v. Coon, 15 App. Div. 92; Bushnell v. Durant, 83 Hun, 32.

The defendant operates its railroad through Orange county in which it owns property and has a place for the regular transaction of business and the action was properly brought in that county. Poland v. United Traction Co., 88 App. Div. 281.

The motion to change the place of trial is denied, with ten dollars costs to the plaintiff to abide event.

Motion denied, with ten dollars costs to plaintiff to abide event.

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MABEL W. BURRITT, Plaintiff v. JACOB L. BURRITT, Defendant.

(Supreme Court, Erie Special Term, February, 1907.)

Divorce — Custody and support of children: Power of court — Exercise of discretion — Provision for future modification of judgment; Matters by which court will be controlled.

Where the referee, in an action by a wife for an absolute divorce, reported in favor of granting the divorce but awarding the custody of the children to the guilty defendant; and it does not appear that the wishes of the children, who are boys from twelve to fifteen years of age, had been consulted, and the court is not satisfied that the evidence justified the conclusion of the referee that the plaintiff's conduct and character establish her unfitness for the training of her children, the report will be confirmed and a judgment of divorce will be granted but with leave to the plaintiff to apply, upon proper proof, for a modification of the judgment as far as relates to the custody of the children and the allowance for their support.

MOTION by the defendant to confirm referee's report, in action for a divorce, in favor of plaintiff, but awarding custody of children to defendant.

W. W. Waring, for motion.

John J. Kuhn, V. V. Goldberg and M. M. Wyvell, opposed.

POUND, J. No attempt was made by defendant on the trial to dispute or disprove his adultery. The contest was wholly over the custody of the children and the allowance for the support of plaintiff and such children. The referee has found in favor of the plaintiff on the question of defendant's adultery, but he has awarded the custody of the three children of the parties, who are boys, aged respectively fifteen, thirteen and twelve years, to the defendant, on the ground that plaintiff's unfitness for the training of her children is established by evidence of her conduct and character produced upon the trial. Plaintiff is denied the right to the companionship of

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her children at any time. It is unusual to award the custody of the children to the guilty defendant, and the grounds upon which such an award is made should be critically examined. To compel these children to live with their father, their own wishes and welfare should be consulted; and it must clearly appear that the character of their mother is such that it would not be safe to entrust to her the education and care of said children, and that the character of the guilty father is such that it would be safer and more prudent to award their custody to him. Osterhoudt v. Osterhoudt, 48 App. Div. 74; People ex rel. Winston v. Winston, 65 id. 231. This case is devoid of evidence that plaintiff ever failed to act toward her children as a devoted mother. The children were not examined on the trial, and it does not appear what their wishes in the matter are.

The referee finds that plaintiff had in her possession certain compromising letters purporting to be addressed to her, the retention of which he construes as evidence of adulterous disposition or conduct on her part toward some unknown person at some time not specified. She denies that she ever received such letters and disclaims all knowledge of them. He also finds that one of the children once called his mother a damn fool and was unrebuked by her, and that on two occasions she was guilty of coarse, though innocent, speech.

While plaintiff may not, in all respects, be an ideal mother, it does not follow that the happiness and welfare of these boys would be promoted by taking them away from her entirely.

The plaintiff is entitled to judgment of divorce, and as this court has power only to confirm or to refuse to confirm the referee's report, the report is confirmed and judgment ordered in accordance therewith, but with leave to the plaintiff to apply, upon proof of the wishes of the children and additional proof as to their future interests, for a modification of the judgment herein as far as relates to the custody of said children and allowance for their support.

Meanwhile, let the execution of judgment be stayed, so far as it awards custody of the children to the defendant.

Ordered accordingly.

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MABEL W. BURRITT, Plaintiff *v.* JACOB L. BURRITT, Respondent.

(Supreme Court, Erie Special Term, February, 1907.)

Reference — Report and findings — Time for making report.

A party may not, under section 1019 of the Code of Civil Procedure, terminate a reference within sixty days after the time when he submits to the referee his proposed findings of fact and conclusions of law. As to him the time within which the referee is required to make his report will not begin to run before the date of such submission.

MOTION by the plaintiff to vacate and set aside referee's report.

John J. Kuhn, Wm. Victor Goldberg, Manton M. Wyvell, for motion.

W. W. Waring, opposed.

POUND, J. The hearings before the referee in this action were terminated on September 29, 1906. At the close of the evidence it was agreed between the attorneys for the respective parties that the case was to be submitted on briefs within twenty days after the stenographer's minutes were written out and delivered to the parties. The stenographer's minutes were written out and sent by express to the attorneys for the respective parties on the 5th day of October, 1906, but the copy sent to defendant's attorney was not actually received by him until October 12 or 13, 1906. On October 25, 1906, defendant's attorney sent to the referee the plaintiff's brief and exhibits and the pleadings in the case, inclosed in a letter in which he says: "I shall submit within a few days proposed findings of fact and conclusions of law." Under date of November 2, 1906, plaintiff's attorney forwarded his proposed findings with a letter which reads as follows: "Several days ago I sent you our brief of plaintiff in the case of Burritt v. Burritt, which was tried before you as Referee. I now enclose proposed findings of

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fact and conclusions of law which I hope you will sign." On December thirty-first, the report of the referee having been prepared but not having been filed with the clerk, nor delivered to the attorney of either of the parties, plaintiff's attorney served a notice upon the attorney for the adverse party that he elected to end the reference, on the ground that the referee had delayed filing his report or delivering the same to one of the attorneys within sixty days from the time that the cause was finally submitted to him for determination. Defendant's attorney took up the report not later than January 1, 1907, less than sixty days after plaintiff submitted his requests to find.

Plaintiff's attorney is not in a position to maintain that the case was finally submitted to the referee by him prior to the date when he submitted his requests to find, which was not earlier than November 3, 1906; and he could not avail himself of the privilege of terminating the reference under the provisions of section 1019 of the Code of Civil Procedure with sixty days from that date.

Section 1023 of the Code of Civil Procedure provides: "Before the cause is finally submitted to the court or the referee, or within such time afterwards, and before the decision or report is rendered, as the court or referee allows, the attorney for either party may submit, in writing, a statement of the facts, which he deems established by the evidence, and of the ruling upon questions of law, which he desires the court or the referee to make."

Plaintiff's attorney, it would seem from his letters, did not regard the case as being finally submitted to the referee by him until he had submitted his proposed findings of fact and conclusions of law. So far as he is concerned, at least, the time began to run from that date.

The report of the referee was, therefore, made and delivered before the expiration of sixty days from final submission; and the attempt to terminate the reference was ineffectual, and the motion to set aside the report must be denied.

Motion denied.

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JOHN H. SEMBLER, as Administrator, etc., Plaintiff, v. FRANK H. COWPERTHWAIT et al., Defendants.

(Supreme Court, Kings County Trial Term, February, 1907.)

Negligence — Actions — Trial and review — Questions for jury.

In an action for personal injuries, resulting in the death of plaintiff's intestate, received in jumping from the fourth story of defendants' burning building in which he was employed, where it appeared that defendants had long neglected to comply with an order of the municipal government requiring them to provide adequate fire escapes, and that plaintiff's intestate, finding a crowd about the only existing fire escape struggling and fighting for access to it and all other means of egress from the building choked with smoke or flames, jumped from a window; and where the questions of defendants' negligence and the contributory negligence of the deceased and the questions of proximate cause, sudden peril and assumption of risks had all been submitted to the jury under instructions to which no exception was taken, and the jury found a verdict for the plaintiff for an amount which is not deemed excessive, a new trial will not be granted.

MOTION to set aside verdict and for a new trial, on the ground that the verdict is excessive and against the weight of evidence; and on the further ground that there is no legal or competent evidence upon which a verdict for the plaintiff can be sustained.

Samuel E. Maires, for plaintiff.

Albert Stickney, for defendants.

CARR, J. In this action, the jury have found a verdict for the plaintiff for the sum of $6,000 damages. The action was brought by the plaintiff to recover damages for the death of his son, a young man twenty-five years of age, through the alleged negligence of the defendants. At the time of his death, the young man resided with his father, earned about $12 a week, was in good health and of good habits. His father, the plaintiff, was about forty-nine years of age at

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the time. On reflection, I do not think the verdict of the jury is so large as to indicate passion or prejudice or to show any undue considerations influencing their judgment. I feel, therefore, that it is not my duty to set aside the verdict as excessive. The other grounds specified in the motion to set aside the verdict are such that I should not disturb the verdict unless the plaintiff's complaint should have been dismissed at the close of his case. The defendants offered no evidence whatever which in any way either rebutted or aided the plaintiff's case. It appeared as a part of the plaintiff's case that, on February 9, 1904, and for many years prior, the defendants were the landlords and had legal title to certain real property on Waverly avenue, in the borough of Brooklyn. This real property was occupied by structures used by a tenant for factory purposes, *i. e.*, the manufacture of chairs. This tenant had occupied the premises for many years prior to the above-mentioned date and had carried on in that place the same business during all the period of its occupancy. No proof was given as to the term or the circumstances of the letting under which the tenant was in occupation. The business carried on in the property in question was of such a nature that quantities of varnish, wood filler and other inflammable substances were kept constantly in stock. The building itself consisted of an original structure five stories high, fronting on Waverly avenue, which had been at one time a church edifice, and a brick extension in the rear, four stories high, which was connected with the older building by a door on each floor cut through a brick wall, which wall had been originally the rear wall of the older building. At no time prior to February ninth was there any fire escape on the original building, nor on the extension, except one iron ladder, without balconies, which was attached to the northwest corner of the extension, on the outside of the building, and which led from a window on the fourth floor of the extension to the ground. On September 12, 1899, a code of ordinances was adopted by the municipal assembly of the city of New York, known as the "Building Code." This code was authorized by section 647 of the Greater New York charter, and ratified by section 407

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of the amended charter of 1901, and was in full force and effect from its adoption up to and subsequent to February 9, 1904, throughout the city of New York. City of New York v. Trustees, 85 App. Div. 361. This ordinance provided, in section 103, among other things, that "every factory, mill, manufactory or workshop, etc., * * * shall be provided with such good and sufficient fire escapes, stairways or other means of egress in case of fire as shall be directed by the Department of Buildings; and said Department shall have full and exclusive power and authority within said city to direct fire escapes and other means of egress to be provided upon and within said building or any of them."

In February, 1903, the department of buildings notified the defendants, in writing, which notice the defendants received at that time, requiring them to provide on the buildings in question forthwith "a fire escape to consist of balconies, stairs, and rails, the same to be located on the easterly side of the building, with balconies at the second, third, fourth and fifth stories; also place a fire escape on the westerly side of the extension with balconies at the first, second, third and fourth stories, with stairs and hand rails, a drop ladder and a goose-neck ladder to the roof; also required to place an iron bridge with guard rails from a proper opening in the westerly side of the roof of the main building at the fourth story to the roof of the extension; also required to place a stationary iron ladder to the scuttle in the extension." At no time prior to February 9, 1904, had the defendants complied with any of these directions, although nearly a year had elapsed since receiving the directions of the department of buildings. On February 9, 1904, some twenty-five to thirty men were at work on the fourth floor of the extension. This floor consisted of three rooms with connecting doors.

A fire broke out in some of the lower floors of the extension. The plaintiff's intestate, who was at work on the fourth floor of the extension, discovered the fire and gave the alarm. Clouds of smoke and flames were said to be coming up through the floor. It appears that he and some other employees attempted to descend a stairway from the

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fourth floor downwards, but found it choked with smoke and flame; they then entered the old church building and found the stairway there similarly choked; they opened various hatchways, leading downward, and found the same conditions, and they then returned to the room on the fourth floor in which a window opened to the iron ladder which reached to the ground at the northwest corner of the extension. Around this ladder was a crush of men, some twenty or more, struggling and fighting for access to it. Young Sembler then went to a window and jumped to the ground, a distance of some sixty feet. He sustained injuries which caused his death the same day. His example was followed by some others, several of whom escaped without injuries except burns received in the building. One fellow employee remained in the room until the ladder was cleared, some seven or eight minutes, as he testified, after Sembler jumped, and escaped by the ladder without injuries, except some burns.

Do these facts make out a case on which the plaintiff should have been allowed to go to the jury? The defendants had ample time to comply with the directions of the department of buildings. These directions were binding on them as owners. Gorman v. McArdle, 67 Hun, 484; McLaughlin v. Armfield, 58 id. 376; Abrayan v. Manfg. Natl. Bank, 16 N. Y. St. Repr. 750; Johnson v. Steam Gauge & L. Co., 146 N. Y. 152. Proof of the violation of the ordinances constituted, at least, a *prima facie* case of negligence in failing to provide additional means of escape as directed by the public authorities. Knupfle v. Knickerbocker Ice Co., 84 N. Y. 488. Of course, unless this negligence was the natural or proximate cause of young Sembler's death, the negligence of the defendants was not actionable. Sembler's death was the result of his jump; but the jump was not necessarily the proximate cause, in a legal sense, of his death. Usually the question of proximate cause is one of fact for the jury to answer. It is only when the facts show clearly that the result was of such a character that reasonable prudence and foresight would not forecast its happening as a consequence

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of the defendants' negligence, that such negligence may be held in law as not the proximate cause of the injury. This proposition of law is too well settled to require citation of authority. Under the proof in this case, this question of proximate cause should have gone to the jury, as it did. Likewise, it was a question for the jury whether Sembler was guilty of contributory negligence in jumping from the window. The rule of "a sudden peril" applied unmistakably. The question of contributory negligence under the proof in the case was clearly one of fact and not of law. The question of assumption of risks, or "*injuria non fit volenti*" was likewise for the jury. Schwandner v. Birge, 33 Hun, 186. I do not understand the learned counsel for the defendants to take any exception to the manner of the court's charge, but simply to the submission to the jury "in any way" of the questions hereinbefore discussed. On the question of defendants' negligence in failing to comply with the ordinance, the defendants offered no evidence whatever; and the *prima facie* case, being uncontroverted, became conclusive on that point.

Motion for a new trial denied. Thirty days' stay and sixty days' time to make a case granted to defendants.

Motion denied. Thirty days' stay and sixty days' time to make a case granted to defendants.

MORRIS FOGEL, an Infant, etc., Plaintiff, *v.* THE INTERBOROUGH R. T. Co., Defendant.

(Supreme Court, New York Special Term, February, 1907.)

New trial — Grounds: In general — Conditions developing since trial; Newly-discovered evidence — In general.

In an action to recover damages for personal injuries, where the testimony of the experts was conflicting upon the question whether there was a fracture of the spinous processes of the vertebræ which might be followed by a permanent paralysis of the lower limbs, and the jury rendered a large verdict for the plain-

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tiff; and where, after appeals to the Appellate Division and to the Court of Appeals, no errors were found to have been committed upon the trial, but the lapse of time since the trial and the plaintiff's physical condition have shown that the honestly expressed opinions of experts that the injuries would result in paralysis were not well founded, such subsequent developments cannot be classed as newly-discovered evidence; but, under the exceptional circumstances of the case, and in furtherance of substantial justice, and in deference to the suggestions contained in the opinion of the Court of Appeals in the present case, a new trial will be granted upon payment by defendant of trial costs and costs on appeal.

MOTION by defendant for a new trial on the ground of newly-discovered evidence in an action by a passenger against a carrier to recover for personal injuries.

Kantrowitz & Esberg (Franklin Pierce, of counsel), for plaintiff.

Charles A. Gardiner (Joseph H. Adams and Frederick S. Randall, of counsel), for defendant.

FITZGERALD, J. Upon the trial of an action to recover damages for personal injuries, a verdict of $6,000 in plaintiff's favor was rendered. Affirmances of the judgment entered upon that verdict have been held at the Appellate Division of this court and in the Court of Appeals. In the opinion filed upon the decision in the Court of Appeals it was said that "the affirmance should be without prejudice to the defendant to move for a new trial upon the ground that paralysis had not occurred." There was a conflict of evidence upon the trial as to the extent and character of the boy's injuries. A physician called on behalf of the plaintiff expressed the opinion that he had sustained a fracture of the spinous processes of the vertebræ, and that, as a consequence, paralysis of the lower limbs would follow within the period of three years from the date of the injury, June 28, 1903. This was disputed by a physician called by defendant, who testified that, if there had been a fracture of the kind claimed, it had reunited and that no spinal difficulty what-

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ever was to be apprehended. Plaintiff's physician, upon cross-examination, said that, if paralysis did not appear within three years, then his opinion was it could not thereafter occur as a result of the injury. The doctors upon both sides agreed that paralysis had not at the time of the trial appeared. Upon the conflicting testimony as to future consequences the issue was submitted to the jury. All the rulings of the learned court during the progress of the trial and the instructions given in the charge have been upheld on appeal. If any questions were raised as to the competency or sufficiency of the evidence to sustain the verdict they have been ultimately determined by the final affirmance. Events subsequent to the trial have, it is claimed, however, conclusively shown that the opinion of plaintiff's expert was unsound. There is no insinuation of collusion, imposition, deceit or fraud of any kind having been perpetrated by the plaintiff, his witnesses or his attorney. An honest mistake in the expression of a physician's opinion is the sole ground of this motion. After-developments, refuting an opinion as to future probable results (required to be testified to only with reasonable certainty), cannot be classified as newly-discovered evidence which may be defined as the existence of material facts unknown to the moving party at the time of the trial, and which reasonable diligence could not have discovered. The well-settled rules governing the disposition of applications for new trials upon the ground of newly-discovered evidence, as set forth in many adjudications, have no application here. Jensen v. Hamburg-Am. Packet Co., 23 App. Div. 163, was a case where subsequent observation tended to prove that plaintiff deliberately and knowingly magnified his injuries. The same is true of Cole v. Fall Brook Coal Co., 40 N. Y. St. Repr. 834. Of a like character are Wood v. Town of Smithfield, 102 N. Y. 288; Nugent v. Metropolitan St. R. Co., 46 App. Div. 105; Corley v. N. Y. & H. R. R. Co., 12 id. 409. While the motion cannot be considered upon the ground of newly-discovered evidence, the inherent power of the court may be invoked to grant a new trial in furtherance of substantial justice. It may well be, as insisted upon by plaintiff's counsel, that the granting

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of the motion under the exceptional circumstances may tend to imperil the security of judgments, may lead to interminable delay in arriving at definite determinations in actions, may be productive of multitudinous and exasperating applications for new trials in cases, particularly, where verdicts rest in any degree upon expert evidence as to future resultant conditions reasonably to be apprehended; thus swelling the volume of litigation and largely increasing the labors of the courts. These are weighty and important considerations, but the opinion of the Court of Appeals, concurred in by all the learned judges (185 N. Y. 562), is before me, and while it may not be absolutely binding as a decision it is certainly entitled to the highest respect. The language used, which must have been carefully considered, is plain and unequivocal. "It seems quite clear that the jury awarded damages upon the theory that the plaintiff would suffer from paralysis as the result of his accident." And, again, alluding to the lapse of time: "That period has now substantially elapsed, and it should be practicable to substitute for opinion and theory actual facts and quite conclusively to demonstrate whether the plaintiff has in fact suffered from paralysis as the result of the accident. Therefore we think that the affirmance of the judgment appealed from should be without prejudice to the right of the defendant, upon proper proofs showing that paralysis has not occurred, to move for a new trial of this action." A number of affidavits have been submitted by defendant which abundantly establish the fact that paralysis has not occurred, although more than three years have passed since plaintiff received his injuries. No depositions have been submitted in opposition, and upon the argument it was frankly admitted by his counsel that plaintiff has not suffered and is not now suffering from paralysis. Motion is, therefore, granted upon payment by defendant of trial costs and costs on appeal.

Motion granted upon payment by defendant of trial costs and costs on appeal.

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CATHERINE S. A. SALMON, Plaintiff, v. THE M. E. BLASIER MANUFACTURING COMPANY, Defendant.

(Supreme Court, Oneida Trial Term, February, 1907.)

Damages — Double and treble damages — When recoverable.

Where the plaintiff seeks treble damages for a forcible entry under section 1669 of the Code of Civil Procedure, it should appear from the complaint that the action is brought to recover such damages; and, in such a case, where there is no allegation of such a claim in the complaint, a motion for treble damages will be denied, although the facts as found by the jury might authorize their recovery.

MOTION by plaintiff that the recovery be trebled.

Timothy Curtin, for motion.

W. L. Goodier, for defendant, opposed.

DEVENDORF, J. The action was tried at this term of court and a verdict rendered in favor of plaintiff, awarding $270 damages. The plaintiff now moves that the damages be trebled, claiming that the action was brought to recover for forcible entry and detainer.

The defendant opposes on the grounds that the action is not brought for treble damages and the plaintiff did not show a forcible entry. The complaint alleges possession of the premises at the time in question in plaintiff and that the defendant, wrongfully, and without any legal right, entered upon and forcibly took possession of said premises and hired a large number of men, with several teams, and caused them to forcibly enter upon said premises and excavate and dig thereon and tear down the fences and, thereafter, tore down the rear portion of the building, known as the kitchen of plaintiff's residence, and permitted the building to fall upon and destroy certain personal property of plaintiff and that, by reason of such acts of the defendant in forcibly

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ejecting plaintiff from said premises, as described in the complaint, the plaintiff's business, that of a boarding-house keeper, was injured, and her property was broken and destroyed, and her health injured, and she sustained damage in the sum of $2,000, for which amount plaintiff demanded judgment.

There is no allegation whatever in the complaint that the plaintiff is entitled to treble damages, or that the action is brought to recover therefor; and no reference is made in any way to the fact that the defendant, by reason of the acts complained of, was liable to answer for treble damages. Neither does the complaint, in the prayer for judgment or elsewhere, ask for treble damages. The action was tried upon the trespass theory rather than that of forcible entry and detainer.

Where treble damages were claimed for cutting trees, it has been said "That the declaration does not allude to the statute a motion for treble damages must be denied. This is essential, as notice to the defendant of the extent to which the plaintiff claims." Brown v. Bristol, 1 Cow. 176; Newcomb v. Butterfield, 8 Johns. 342.

"On motion for treble damages, the count must be upon the statute, the jury must find for the plaintiff generally, and assess the single value of the wood cut, in terms. Otherwise the court will intend, that the jury found treble damages, or that the defendant brought himself within the provisions of the act." Livingston v. Platner, 1 Cow. 175. Again, in Benton v. Dale, 1 Cow. 160, the court says, "It is a sufficient answer to the application for trebling the damages, that the verdict is general on both counts. To entitle the plaintiff to have the damages and costs trebled, it should have been on the first count only, which was upon the statute."

The above cases, as stated, were for cutting of trees; and it may be said there is more reason why the complaint should allege for treble damages in those cases than in this, because the defendant is excused from all but single damages in the tree cases, if the trespass was casual or involuntary, or if the defendant had reason to believe he owned the land, or

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if the trees were taken for highway purposes. Code Civ. Pro., § 1669. I do not think Robinson v. Kinne, 1 T. & C. 60, is a point in plaintiff's favor on this motion, because that was an action to recover for waste; and the recovery in such cases is limited to the amount of damages to the freehold or inheritance. The provisions of the Revised Statutes relating to the action of waste, as said in that case, apply to all actions brought thereunder, without regard to the form of the action; and, while the complaint contained no reference to the statute or the provision of treble damages, yet it is stated in the opinion that that would not be necessary in such an action.

Plaintiff in this action asks to recover treble damages regardless of the fact that her complaint is silent on that subject. Section 1669, Code Civil Procedure, provides that, if a person is disseized, ejected or put out of real property, in a forcible manner, or, after he has been put out, is held and kept out, by force, or by putting him in fear of personal violence, he is entitled to recover treble damages, in an action therefor against the wrongdoer.

From the language of that section I infer that the action must be brought *for the recovery of treble damages,* not that it can only be inferred from the complaint; there should be allegations bringing it within the scope of that section and the damages alleged should be restricted to such as are properly provable for forcible entry and detainer. It will be observed that the complaint alleges that the plaintiff's business was injured and her personal property broken and destroyed and her health injured; clearly some of the damages are not of such a nature as to be trebled and may have been considered by the jury in fixing the amount of the verdict rendered. The damages recoverable are such, only, as are the natural and proximate results of forcible entry, or forcible or unlawful detainer; therefore, no recovery could be had for injured health or bodily or mental suffering.

I think the defendant was entitled to have this case tried and presented to the jury upon the theory that treble damages were to be asked for by the plaintiff and were to be awarded accordingly upon the verdict, if rendered in favor of the plaintiff. The trebling of damages is not discretionary

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with the court; it is a matter of right if the plaintiff, by allegation and proof, comes within the lines of the statute.

The language of the Code, section 1669, contemplates that the action shall be brought to recover the treble damages; and, while I think there was sufficient force used by the defendant, assuming the facts to be as found by the jury, to constitute a forcible entry, yet, considering the allegations of the complaint as a whole and the theory upon which the case was tried and submitted to the jury, I have come to the conclusion that the damages as awarded cannot legally be trebled. The motion is, therefore, denied.

Motion denied.

WILLIAM W. PENFIELD, Plaintiff, *v.* THE CITY OF NEW YORK et al., Defendants.

(Supreme Court, New York Special Term, February, 1907.)

Costs — Amount — Statutory allowances at various stages of proceedings — Proceedings before notice — On interlocutory judgment.

Upon an interlocutory judgment sustaining a demurrer to the complaint, the defendant is not entitled to tax costs before notice of trial.

MOTION for a retaxation of costs.

Wetherhorn & Link (Edward Brown, of counsel), for motion.

William B. Ellison, Corporation Counsel, opposed.

GIEGERICH, J. The plaintiff demurred to the separate defense set up in the answer and the demurrer was sustained, with costs. Upon the taxation of the costs the clerk disallowed, among others, the item "costs before notice of trial," which is the only one the plaintiff seeks to review. In Jones v. Butler, 82 Hun, 91, the plaintiff demurred to certain para-

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graphs in the answer. The demurrer was sustained, with leave to amend, and it was held that the judgment entered was simply interlocutory and not final, and that in the taxation of costs the plaintiff was improperly allowed the item for proceedings before notice of trial. The doctrine of this case was followed in Garrett v. Wood, No. 2, 61 App. Div. 294, and in Chase v. Drake, 92 id. 613. The plaintiff contends, however, that these cases are no longer controlling, in view of the opinion of the court in the recent case of de Turckheim v. Thomas, 113 App. Div. 123. While the opinion in that case apparently holds the plaintiff's views, it nevertheless concludes in the following words: "If this were an original question we would decide it in accordance with our own views as herein expressed, but we feel constrained to follow Jones v. Butler, Garrett v. Wood, No. 2, and Chase v. Drake, *supra,* and leave it to the Court of Appeals to decide whether those cases properly construe the provisions of the Code of Civil Procedure." The case just quoted, even if it were similar in its facts to the present one, is, therefore, not an authority in the plaintiff's favor. The facts, however, in the two cases were entirely different. The former was a common-law action for work, labor and services performed and materials furnished. The defendant demurred upon the ground that the complaint failed to state facts sufficient to constitute a cause of action, and the demurrer was sustained, with leave to the plaintiff to amend on payment of costs. This action is in equity to enjoin and restrain the defendants from collecting and causing the filth, waste, dirty water and other unwholesome, ill-smelling and obnoxious substances to flow, empty or discharge over, in and upon the plaintiff's lands, and from permitting the same to be done, and particularly that the defendant, the City of New York, its officers, agents, servants and employees, and each of them, be enjoined and restrained from proceeding with or carrying out its and their threat, attempt and effort to connect or permit the connection of other and additional premises in the village of Wakefield, New York city, with the Becker drain or sewer, and thus increase the flow of filthy substance over, in and upon plaintiff's land, and also for

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the sum of $10,000 damages. That the justice who wrote the opinion of the court in de Turckheim v. Thomas, *supra*, intended to limit the application of his views to cases of that class is evident from this language (p. 128): "I am, therefore, of the opinion that where a demurrer to the entire complaint in a common-law action is sustained and leave is given to the plaintiff to amend, the defendant is entitled as a matter of right on entering the interlocutory judgment to tax full costs to that time and then, if leave to amend be not accepted, on entering final judgment he would only be entitled to tax the costs of entering the final judgment." In the case at bar the original pleadings stand and the issues are still to be tried, and the judgment entered upon the demurrer was simply interlocutory and not final. It results from those views that the clerk was right in disallowing costs before notice of trial.

Motion denied.

BANDINN SAGEHOMME, Plaintiff, *v.* PAUL B. PUGH & Co., Defendant.

(Supreme Court, New York Special Term, February, 1907.)

Stay of proceedings — Supersedeas or stay by proceedings for review — Allowance or order for stay — Necessity for allowance.

Contempt — What constitutes — Disobedience — Excuse for disobeying generally.

Where a judgment directing defendant to remove forthwith certain obstructions from plaintiff's premises is affirmed by the Appellate Division, the usual undertaking to perfect an appeal to the Court of Appeals, pursuant to section 1326 of the Code of Civil Procedure, does not stay the judgment; but, where it appears that defendant's failure to obey the judgment was because of an honest belief that the giving of the undertaking effected a stay, a motion to punish him for contempt will be denied, upon condition that, if within five days after the service of notice of the entry of the order denying such motion, defendant fails to move for a stay of proceedings on notice, or if he makes such a motion and does not bring it diligently on for argument, or a stay is granted upon terms not complied with, or denied, the motion to punish him for contempt may be renewed.

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MOTION to punish for a contempt.

James S. d'Arcy, for motion.

Hugo S. Mack (Selden Bacon, of counsel), opposed.

GIEGERICH, J. The plaintiff applies for an order to punish the defendant corporation and two of its chief executive officers for contempt for alleged willful disobedience of a judgment directing the defendant forthwith to remove certain obstructions from the plaintiff's premises. The judgment, which also awards costs to the plaintiff amounting to $139.55, has been affirmed by the Appellate Division, and the defendant has appealed to the Court of Appeals. The defendant has given an undertaking in the sum of $500 for the payment of all costs and damages, pursuant to section 1326 of the Code of Civil Procedure, which it is claimed stays all proceedings upon the judgment appealed from. This contention is made under section 1310, which, so far as material, provides: "Where an appeal to the general term of any court or to the appellate division of the supreme court or to the court of appeals or otherwise has been heretofore or shall hereafter be perfected, as prescribed in this chapter, and the other acts, if any, required to be done, to stay the execution of the judgment or order appealed from, have been done, the appeal stays all proceedings to enforce the judgment or order appealed from." Section 1326 of the Code prescribes that to perfect the appeal the appellant must give an undertaking for the costs and damages of the appeal not exceeding $500. But such an undertaking for costs does not affect a stay of execution of a judgment; that matter, in the case of ordinary judgments, is regulated by sections 1327 to 1331, both inclusive, which provide, respectively, for staying judgments; (§ 1327) for money; (§ 1328) directing the assignment or delivery of a document or of personal property; (§ 1329) recovery of a chattel; (§ 1330) directing the execution of a conveyance, and (§ 1331) directing the sale or delivery of the possession of real property. The Code of Civil Procedure does not seem

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to have provided for the staying of proceedings upon the mere giving of an undertaking without an order of the court in a case like the present one. Indeed, the absence of such a provision was commented upon in Genet v. D. & H. C. Co., 113 N. Y. 475, where it was held that the court below had power, in its discretion, to relieve the defendant from the operation of the injunctive judgment pending the appeal and the case was sent back to the General Term for action, the court saying: "The appeal does not of itself relieve the defendant from the duty to obey the judgment. The statute does not prescribe any method by which the execution of a judgment can be stayed in a case like this. Nor would a mere order staying proceedings by the plaintiff enable the defendant to prosecute its business in violation of the judgment." The case of McElroy v. Mumford, 128 N. Y. 303, relied upon by the defendant, is not in point here, as the judgment in that case was an ordinary money judgment, and the only question which arose was whether the sureties were liable on the bond on appeal for the amount of the original judgment. The court held that the bond was sufficient to stay execution on the original money judgment, and that the sureties were liable. Neither is Howe v. Searing, 6 Bosw. 354, in point. That arose under the old Code, the provisions of which, so far as they related to a stay of proceedings in a case like this, were entirely different. It thus seems that the giving of the undertaking in this case did not entitle the defendant to a stay of the execution of the judgment without an order of the court to that effect. It certainly would not have stayed proceedings upon a judgment for the payment of a sum of money. Dwyer v. Rorke, 8 App. Div. 617. It is clear that a stay in a case like this can only be granted by the court upon notice to the adverse party and upon such terms as to it may seem just. It is not claimed that the defendant has obtained such an order, nor does the defendant or its officers pretend to have obeyed the directions contained in the judgment. While under ordinary circumstances the respondents might be adjudged guilty of a contempt of court, I am satisfied that they failed to obey the judgment not from any intention to disobey,

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but rather because of an honest belief that all proceedings were stayed by the giving of the undertaking. Under these circumstances the motion to punish them for contempt will be denied, provided within five days after service of notice of entry of the order hereon an application shall be made to the court for a stay of proceedings, and that ten dollars costs be paid. If this is not done, or if the motion is made and it is not diligently brought on for argument by the defendant, or if the motion is granted on terms and such terms are not complied with, or if such motion for a stay is denied, the motion may be renewed upon additional papers.

Ordered accordingly.

ANTONIO CAGLIOSTRO, Plaintiff, *v.* PIETRO INDELLI, Defendant.

(Supreme Court, New York Special Term, February, 1907.)

Bankruptcy — Discharge of bankrupt — Debts affected — Debts improperly scheduled.

Where a bankrupt in his schedules fails to state the street number of the residence of a judgment creditor which with reasonable diligence he could have ascertained, and, owing to such failure, the creditor receives no notice of the bankruptcy proceedings and denies any knowledge thereof, a motion to cancel his judgment will be denied.

MOTION for the discharge of a judgment.

Maurice J. Katz, for motion.

Joseph Gifuni, opposed.

GIEGERICH, J. Upon this motion for the discharge of a judgment the only question is as to whether the address of the judgment creditor as set forth in the schedules was sufficient. The residence, as stated in such schedules, is simply "Mulberry street, New York City." In opposition

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it is shown that the creditor in fact resides at No. 141 Mulberry street, and was residing at that place at the time of the filing of the petition and schedules, and had resided at such place for fifteen years last past, and that his name and address have regularly appeared in the city directories since the time the judgment was rendered, and, furthermore, that his attorney's name appears on the transcript of the judgment, and that the attorney's name and address have regularly appeared in the city and telephone directories since the time the judgment was rendered. The judgment creditor also denies that he had any knowledge that the defendant had filed a petition in bankruptcy, until he was informed by his attorney that the present motion had been made, and that he ever received any notice, personally or by mail or otherwise, calling upon him to prove his claim. I am satisfied that the petitioner, when he made up the schedules, failed to use due efforts to learn the street number of the judgment creditor, and that it was owing to such failure on his part that the judgment creditor received no notice. Such failure deprives him of the right to a discharge of such judgment. Columbia Bank v. Birkett, 174 N. Y. 112; Sutherland v. Lasher, 41 Misc. Rep. 249; affd., 87 App. Div. 633. It may be that, in the absence of other evidence, there is a presumption that the postal authorities would deliver a letter to the plaintiff addressed, simply, "Mulberry street," without any addition of the street number; but such presumption cannot prevail as against the positive statement of the plaintiff that he never received such notice.

Motion denied, without costs.

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EDWARD J. SELLEY and WILLIAM MARTIN, Plaintiffs, *v.* THE IRISH INDUSTRIAL EXPOSITION AND AMUSEMENT COMPANY, Limited, Defendant.

(Supreme Court, New York Special Term, February, 1907.)

Judgment: Rendition — At particular stages of the action — Judgment on demurrer — Interlocutory and final judgment; Entry — What constitutes.

Final judgment should not be entered after the trial of the issues of law arising upon a demurrer to a counterclaim where issues of fact remain to be tried.

Filing with the clerk an order sustaining a demurrer to a counterclaim signed by the judge without the order being signed by the clerk does not constitute an entry thereof, nor is the order an interlocutory judgment; and final judgment entered pursuant thereto will be vacated.

MOTION to set aside and vacate a judgment.

Bushby & Berkeley, for the motion.

Edward C. Dowling, opposed.

GIEGERICH, J. This is a motion to set aside and vacate a judgment entered January 28, 1907, on the grounds: (1) That the plaintiffs' time to reply had not expired at the time the judgment was entered; (2) that the judgment was entered without notice to the plaintiffs and without application to the court; (3) that the entry of the judgment was irregular and void, and the affidavit of the attorney upon which the same was entered was untrue; (4) that the judgment-roll attached to the said judgment does not contain any paper bearing the genuine signature of Mr. Justice Greenbaum. From the papers submitted it appears that in the answer a counterclaim was set up for a sum of money only. To this counterclaim a demurrer was interposed on the ground that it appeared on the face of the counterclaim that it did not state facts sufficient to constitute a cause

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of action. This demurrer was heard by Mr. Justice Greenbaum; and, on or about the 5th day of November, 1906, he signed an order in which he adjudged "that said demurrer be and the same hereby is overruled, with twenty dollars costs, and with leave to the plaintiffs to serve a reply to the counterclaim within twenty days of the date hereon on the payment of said costs to the defendant's attorneys." It further appears that this order and notice of the entry thereof were served upon the plaintiffs' attorneys on or about November 6, 1906, and that on the same day or the day before the order itself, without any other paper, was filed with the clerk of Special Term, Part IV, where the demurrer was argued, and is called the interlocutory judgment; but it is clear that the clerk of this court did not at that time sign the said paper or affix his name thereto, as required by section 1236 of the Code of Civil Procedure, which provides that "Every interlocutory judgment or final judgment shall be signed by the clerk and filed in his office, and such signing and filing shall constitute the entry of the judgment." The plaintiffs have failed to distinguish between the entering and filing of a paper, although there is a material difference between the two. Lent v. N. Y. & M. R. Co., 130 N. Y. 504, 509. The case of Finck v. Wallach, 109 App. Div. 718, relied upon by the defendant, relates solely to filing, and does not in any way relate to the entry of a judgment or order. Without considering any other objections on this score, therefore, it must be held that the paper relied upon as an interlocutory judgment was in fact not such.

Another reason why the motion to set aside the final judgment should be granted is that the case was not in any position for the entry of a final judgment at all, wholly irrespective of any question of the regularity of the earlier proceedings. In addition to the counterclaim the answer contained denials of various allegations of the complaint: and, therefore, issues of fact remained undisposed of after the issues of law raised by the demurrer to the reply had been determined. Section 1221 of the Code of Civil Procedure provides that "Where one or more issues of law, and

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one or more issues of fact, arise in the same action, and all the issues have been tried, final judgment upon the whole issue" may be taken, and prescribes the several methods to that end. So, likewise, section 1222 provides for a final judgment upon an issue of law where no issue of fact remains to be tried. From these provisions it is plain that the statute does not contemplate the entry of a final judgment in a case like the present, and that to permit such practice would lead to the result of having more than one final judgment in the same action. These views require the granting of the motion and render it unnecessary to consider the other objections made to the regularity of the judgment. Motion granted, with ten dollars costs to abide the final event of the action.

Motion granted, with ten dollars costs to abide final event of action.

GEORGE G. DEWSNAP, Plaintiff, *v.* MOSES MATTHEWS et al., Defendants.

(Supreme Court, New York Special Term, February, 1907.)

Appeal — Who may appeal — Persons not parties.

The owners of the equity of redemption of property of which a receiver has been appointed are entitled to appeal from an order denying them leave to come in as parties defendant, and a motion to compel acceptance of their notice of appeal will be granted.

MOTION to compel acceptance of a notice of appeal.

The appellants, Irving Bachrach and Isaac Schmeidler, served a notice of appeal from an order denying their application to be made parties defendant. Such notice of appeal was returned by the plaintiff's attorney on the ground they are not parties to the action and the appellants have brought on this motion to compel him to accept the same.

Paul Gross (Herman Kahn, of counsel), for motion.

Alfred T. Davison, opposed.

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GIEGERICH, J. I think it sufficiently appears from the filed papers that the persons now seeking to bring on the appeal applied for leave to be made parties defendant, which application was denied. They are the owners of the equity of redemption of the property of which a receiver has been appointed, and should be permitted to bring on their appeal from the order denying them leave to come in as parties. 2 Encyc. Pl. & Pr. 152, 153; Nat. Park Bank v. Goddard, 48 N. Y. St. Repr. 744. The motion to compel acceptance of the notice of appeal is, therefore, granted, with ten dollars costs to abide the final event of the action.

Motion granted, with ten dollars costs to abide final event of action.

THOMAS J. TYNAN, Plaintiff, *v.* AUTO MART et al., Defendants.

(Supreme Court, New York Special Term, February, 1907.)

Attorney and client — The relation with the client — Lien: Right to lien — In what courts lien may be acquired; Enforcement — By action in Supreme Court.

Although the Municipal Court of the city of New York has no jurisdiction to enforce an attorney's lien, an attorney who has rendered services in an action brought in that court is entitled to a lien under section 66 of the Code of Civil Procedure and may maintain an action in the Supreme Court to enforce it.

ACTION to foreclose an attorney's lien.

M. Strassman, for plaintiff.

William J. Moran, for defendants.

BLANCHARD, J. The plaintiff brings action to foreclose a lien which he alleges now subsists by virtue of section 66 of the Code of Civil Procedure, upon a cause of action in which the plaintiff's assignor, an attorney, represented one

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Anna Gross, who brought action thereon in the Municipal Court of the city of New York, and subsequently compromised and settled said action without paying the plaintiff's assignor for his services as attorney. The defendant demurs on the ground that the complaint, which sets forth the above facts, fails to state a cause of action. Although it has several times been held that an attorney's lien could not be enforced in the Municipal Court of New York city, it does not appear to have been decided whether an attorney was allowed a lien under section 66 of the Code of Civil Procedure upon actions brought in that court. People ex rel. Jaffe v. Fitzpatrick, 35 Misc. Rep. 456; Van Der Beek v. Thomason, 50 Misc. Rep. 524. Section 20 of the Municipal Court Act, which provides that the provisions of the Code of Civil Procedure "shall apply to the Municipal Court as far as the same can be made applicable" has been held as "merely intended to regulate the practice in matters over which the Municipal Court has jurisdiction." Matter of Bolte, 97 App. Div. 577. As was stated in People ex rel. Jaffe v. Fitzpatrick, *supra,* there is no provision of statute making section 66 of the Code of Civil Procedure applicable to the Municipal Court of New York city. In Drago v. Smith, 92 Hun, 536, it was said that section 66, above mentioned, did not apply to a case in the Municipal Court of Buffalo. This court, however, differed from the Municipal Court of New York city, for, although in the Municipal Court of Buffalo every pleading was required to be subscribed by a duly admitted attorney (Laws 1880, chap. 344, § 9). it was, nevertheless, permissible for persons not duly admitted as attorneys to practice therein. In the Municipal Court of New York city, however, none but duly admitted attorneys are permitted to practice. Code Civ. Pro., § 63. In Flint v. Van Dusen, 26 Hun, 606, it was said that so long as a Surrogate's Court was not a court of record no lien could be acquired by an attorney upon an action therein. The reason, as stated by the court, was that "in those courts there are no attorneys in the sense in which that term is used in courts of record (Fox v. Jackson, 8 Barb. 355), and it is only in respect of the party's character of attorney

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or solicitor that the claim to a lien exists. * * * No one will contend that a lien exists for services rendered by an attorney in a justice's court." This decision, however, and the reasoning upon which it rests was completely superseded by subsequent legislation making Surrogates' Courts courts of record and expressly recognizing the rights of parties to appear therein by attorney. Matter of Regan, 167 N. Y. 338, 342. The application of section 66, above mentioned, to courts which are not of record, but in which only duly admitted attorneys may practice, is presented, therefore, as a new question. In its present form section 66 of the Code of Civil Procedure provides that "the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim" from the moment he appears in the action. No limitation is made by the section as to courts in which the cause of action shall be prosecuted, unless possibly one can be spelled out of the provision that "the court, upon the petition of the client or attorney, may determine and enforce the lien." Strong reasons appear against implying such a limitation. It has been held that this section should be liberally construed. Matter of Pieris, 82 App. Div. 466; affd. upon the opinion of App. Div. in 176 N. Y. 556; Fischer-Hansen v. Brooklyn Heights R. R. Co., 173 N. Y. 492, 499. This section shows the fixed determination of the Legislature to protect attorneys against fraudulent settlements. It adds to the remedy of a lien upon a judgment, which was a device invented for the protection of attorneys "against the knavery of their clients by disabling their clients from receiving the fruits of recoveries without paying for the valuable services by which the recoveries were obtained." Goodrich v. McDonald, 112 N. Y. 157, 163. Lord Kenyon many years ago announced a sound principle in Read v. Dupper, 6 Term Rep. 362, which was approved in Mooney v. Second Ave. R. R. Co., 18 N. Y. 368, 372, when he said: "A party should not run away with the fruits of a cause without satisfying the legal demand of his attorney, by whose industry, and in many instances at whose expense, those fruits are obtained." Although the accompanying provisions of the Code of Civil Procedure afford

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the attorney a remedy by petition, this remedy is merely cumulative, and accordingly separate and distinct actions may still be brought to foreclose the lien afforded by section 66. Fischer-Hansen v. Brooklyn Heights R. R. Co., *supra;* Smith v. Acker Process Co., 102 App. Div. 170. In line with this rule the courts have consistently discouraged the continuance of the action upon which the attorney claimed a lien when the sole purpose of continuance is to ascertain the amount of the lien. Fischer-Hansen v. Brooklyn Heights R. R. Co., *supra;* Smith v. Acker Process Co., *supra;* Sullivan v. McCann, 113 App. Div. 61. Such being the rule, it follows that the attorney is not obliged to bring his action upon section 66 in the same court where his client's cause of action may proceed. Thus in Matter of Pieris, *supra,* it was held that the Supreme Court could entertain proceedings to ascertain and determine the amount of an attorney's lien for services rendered in a proceeding in a Surrogate's Court. The conclusion from these authorities is that the attorney is not deprived of his lien by reason of the inability of the court in which his client's cause of action was prosecuted to enforce the lien, and consequently that he may begin action in any court, having jurisdiction to enforce such a lien, for the purpose of obtaining the relief granted by section 66 of the Code of Civil Procedure. Such a conclusion is induced in the present case by the further fact that in the Municipal Court of New York city none but duly admitted attorneys who are authorized to appear before any court in the State may practice. In view of the qualifications thus required of practitioners before this court, they should not be denied the protection and benefits which section 66 of the Code of Civil Procedure by its express language confers upon every practitioner "who appears for a party." Unless attorneys practicing in the Municipal Court of New York city are afforded such protection they will be reluctant to bring actions in that court, and will tend to increased litigation in the superior courts, for the relief of which the Municipal Court of New York city exists.

Demurrer overruled.

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CHARLES F. MUELLER, as Executor of AUGUSTA MUELLER, Deceased, Plaintiff, *v.* PHILIP GOERLITZ, Defendant.

(Supreme Court, New York Trial Term, February, 1907.)

Bankruptcy — Discharge of bankrupt — Debts affected — Debts improperly scheduled.

Recording written instruments and notice of title — Record of instruments as affecting priority between instruments or rights — Effect of record in general — Persons affected by record.

The recording of an assignment of a mortgage is not constructive notice thereof to the mortgagor; and, where a bankrupt, having no actual notice that the mortgage given by him had been assigned, scheduled the original mortgagee as the creditor, his discharge in bankruptcy is a defense to an action upon the accompanying bond.

ACTION on a bond.

T. Sattler, for plaintiff.

Hays & Hershfield, for defendant.

GREENBAUM, J. This is a common-law action on a bond. The conceded facts are that defendant executed his bond and a collateral mortgage on his real property which were thereafter assigned by the mortgagee to plaintiff's testatrix; that the assignment of mortgage was duly recorded in the office of the register prior to defendant's discharge in bankruptcy; that defendant had no actual notice of the assignment, and that the original mortgagee alone was described in the defendant's schedules in bankruptcy as the creditor whose indebtedness was evidenced by the bond in suit. Whether the discharge in bankruptcy is a good defense is the question presented. Plaintiff contends that the omission of the name of his testatrix as creditor in the bankruptcy schedules overcomes the effect of the discharge, urging that the record of the assignment of the mortgage was constructive notice to defendant of her ownership of the bond. The

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Recording Acts have reference only to conveyances of realty and include in the definition of the term "conveyance" "every written instrument by which any estate or interest in real property is created, transferred, mortgaged or assigned," etc. Real Prop. Law, § 240. The same act provides that every such conveyance not recorded "is void as against any subsequent purchaser in good faith and for a valuable consideration from the same vendor, his heirs or devisees, of the same real property or any portion thereof, whose conveyance is first duly recorded." § 241. "The object of the Recording Acts is to prevent fraud, to prevent the person having title to land from selling it more than once." Jackson v. Post, 15 Wend. 588, 594. The recording of a conveyance of the character defined in the act has relation merely to the realty and operates as notice to all subsequent *bona fide* purchasers for value of the same property. McPherson v. Rollins, 107 N. Y. 316, 322; Tarbell v. West, 86 id. 282, 288. A mortgagor is not chargeable with notice of the recording of an assignment of a mortgage. Ely v. Schofield, 35 Barb. 335. It is "only constructive notice to subsequent purchasers or assignees of or from the mortgagee, or the original assignor." Reid v. Marble, 10 Paige, 413. Section 271 of the Real Property Law expressly declares what before the enactment had been recognized by the decisions that "the recording of an assignment of a mortgage is not in itself notice of such assignment to a mortgagor, his heirs or personal representatives, so as to invalidate a payment made by either of them to the mortgagee. James v. Morey, 2 Cow. 288; Brewster v. Carnes, 103 N. Y. 561. The bond in suit is not an instrument that creates, transfers, mortgages or assigns an estate or interest in real property. It was not recorded, as it clearly was unnecessary either to record it or the assignment thereof for any purpose. The mortgage upon the realty given as collateral to the bond alone fell within the Recording Acts. It is thus evident that not only is the record of the assignment of a mortgage not constructive notice to the mortgagor, but that the assignment of the bond which is the original obligation and which has no relation to the realty is not the subject of record.

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I know of no provision of the Bankruptcy Act which imposes a duty upon the bankrupt, before scheduling his liabilities, to search any records for the purpose of ascertaining whether his creditors have assigned or otherwise disposed of their claims. It requires the name of the creditor to be stated "if known." Section 17 provides that a discharge releases the bankrupt from all of his provable debts, except such as "(3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt. * * *." Actual notice of the creditor's name is the test. In construing this section of the act it has been held that where a bankrupt has actual knowledge that his creditor has transferred his debt it must be scheduled in the name of the transferee and not in the name of the original creditor. Columbia Bank v. Birkett, 174 N. Y. 112, 116; affd., 195 U. S. 345. Where the debt was scheduled in the name of a creditor who was dead and whose death was unknown to the bankrupt it was held to be a sufficient compliance with the Bankruptcy Act. Lent v. Farnsworth, 94 App. Div. 99; affd., 180 N. Y. 503. If an assignee of a nonnegotiable chose in action wishes to protect himself against payment to the original creditor it is his duty to give notice to the debtor of the assignment, and the burden of establishing the fact of notice is on the assignee in an action to recover on the assigned claim. Heermans v. Ellsworth, 64 N. Y. 159, 161; Stoddard v. Gailor, 90 id. 575, 579; Wangner v. Grimm, 169 id. 421, 428.

Judgment for defendant, with costs.

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WILLIAM M. ROUSE, Plaintiff, *v.* CARRIE A. WHITNEY, DANIEL F. PAYNE, SAMUEL H. HODGKINS and JESSE BRAHAM, Defendants.

(Supreme Court, Essex Special Term, February, 1907.)

Guardian and ward: Accounting and settlement — In general — Settlement between guardian and ward — When not to be inferred; Rights and liabilities on guardianship bonds and actions thereon; Defenses; Evidence.

Bonds: Validity — Fraud — A defense to action on guardian's bond; Breach — Evidence.

In an action against a guardian and her sureties upon her bond to recover money alleged to have been lost through improper investments it is no defense to the sureties that they were induced to sign the bond by the false and fraudulent representation of the guardian as to the investment of the ward's money, made at or prior to the execution of the bond.

The return unsatisfied of an execution, issued upon the surrogate's decree entered upon the judicial settlement of the guardian's account, justifies an action against the guardian's sureties and is sufficient proof that the plaintiff, the late ward, has exhausted his remedy against the guardian.

A deed of conveyance from the guardian to her late ward is not presumptive evidence of a settlement of all matters between them and may not, by inference, be extended to matters not specifically mentioned or referred to therein.

ACTION under section 2607 of the Code of Civil Procedure by William M. Rouse, late infant, against Carrie A. Whitney, his former guardian, and the sureties upon her bond for the recovery of moneys alleged to have been lost through improper investments. The answer of the defendants Payne and Hodgkins alleges at the time they executed the bond, said Whitney "represented and stated falsely and fraudulently" that the bonds in which the investment had been made were good and valid, and that they were thereby induced to sign the bond.

Frost, Daring & Warner, for plaintiff.

Smith & Wickes, for defendants Payne and Hodgkins.

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Keeshan & Sleicher, for defendant Whitney.

SPENCER, J. The only debatable question in this case, as it seems to me, is the one passed upon by the court during the progress of the trial, and that is whether the defendants Payne and Hodgkins, as sureties upon the bond of the defendant Whitney, as guardian, may allege and establish as against the plaintiff, the infant, any fraud or misrepresentation on the part of the defendant Whitney at or prior to the time of the execution of the undertaking so as to invalidate such undertaking. I was then of the impression that they could not, and am still of the same view.

I think the surrogate's decree, under date of March 3, 1906, was to all intents and purposes a final settlement of the guardian's account. The defendants Payne and Hodgkins, as sureties upon the guardian's bond, were parties to that proceeding and are bound by the decree entered therein until the same has been modified or reversed by competent authority.

I am also of the opinion that the return unsatisfied of an execution issued upon a surrogate's decree in such a proceeding is all that is necessary to justify an action against the guardian's sureties and sufficient proof that the plaintiff has exhausted his remedies against the principal in the undertaking.

The deed of conveyance from the defendant Whitney to the plaintiff, dated July 24, 1905, is not to my mind presumptive evidence of a settlement and adjustment of all matters between them. It may not by inference be extended to matters other than those therein specifically mentioned or referred to. The subject-matters of that conveyance being set forth therein, it will be presumed that it has application to only such matters as are specified.

It follows that judgment must be entered for the plaintiff for the relief demanded in the complaint against defendants, with costs.

Let findings of fact and conclusions of law be prepared and submitted in accordance herewith.

Judgment accordingly.

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ALDEN SPEARE'S SONS' CO., Plaintiff, v. CASEIN CO. OF AMERICA, Defendant.

(Supreme Court, New York Special Term, February, 1907.)

Pleading — Complaint or declaration — Conditions precedent — Performance or waiver.

Where a complaint sets forth an agreement containing several stipulations which might or might not be construed as conditions that must be complied with before the plaintiff can put the defendant in default, a further allegation that "all the conditions above mentioned were fulfilled or were waived by the defendants" determines the character of such conditions and requires that the facts constituting performance and waiver should be alleged; and, in the absence of such allegations, a demurrer to said complaint should be sustained.

DEMURRER to complaint.

Carter & Haskell, for plaintiff.

Gillespie & O'Connor, for defendant.

BLANCHARD, J. The agreement set forth in the complaint contains several stipulations which might or might not be construed as conditions which must be complied with before the plaintiff could put the defendant in default. The complaint then alleges that "all the conditions above mentioned were fulfilled or were waived by the defendants." This allegation determines the character of the stipulations mentioned, and requires that the facts of performance and of waiver be alleged without qualification and by an averment of the facts constituting such performance and waiver. Todd v. Union Casualty & Surety Co., 70 App. Div. 52; Pope Mfg. Co. v. Rubber Goods Mfg. Co., 110 id. 341; Smith v. Brown, 17 Barb. 431. Since the complaint is defective the demurrer thereto on the ground that it fails to state a cause of action is sustained.

Demurrer sustained.

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LEWIS M. JONES, Plaintiff, *v.* THOMAS J. MCNALLY, Defendant.

(Supreme Court, Saratoga Special Term, February, 1907.)

Pleading: Complaint or declaration — Statement of cause of action in general; Demurrer — Hearing and determination — Nature of relief demanded.

Contracts — Interpretation of contract — Particular agreements — Agreements for sharing profits and losses on venture in stocks.

Where a plaintiff's right of action, because of the absence of any allegation as to the legal effect of the contract sued on, must be inferred from the contract which constitutes the parties joint undertakers in a stock venture, the profits and losses to be borne equally, with the right to call each other to account, and contemplates both the holding and sale of stock, and where, although the complaint fails to allege a cause of action for an accounting of profits and losses or for contribution, the same may be inferred from other allegations and the facts may be regarded as sufficient to constitute a cause of action for terminating the joint engagement but the prayer for relief is for a sum of money only, the complaint does not state facts sufficient to constitute a cause of action for an accounting and contribution.

And where, in such a case, the stock still remains with the parties and the loss therein has not been determined by an actual sale, a mere allegation of its worthlessness will not serve as a sufficient foundation for an action for debt.

DEMURRER to complaint.

Walter H. Cogan (J. L. Henning, of counsel), for plaintiff.

Rockwood & Salisbury, for defendant.

SPENCER, J. The rule which obtains (Marie v. Garrison, 83 N. Y. 14), that the court must indulge all reasonable inferences in support of a pleading, may have its place when the question is first raised after answer, reply or trial; but, when applied in motions to make definite and certain or for bills of particulars or upon demurrer, it is both illogical and

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absurd. In such instances it is not unfair to impose upon the pleader the burden of making his pleading clear and definite by express allegations. But the rule, as firmly established in our practice, puts the hazard upon the pleader's opponent to go to trial with scant knowledge of the cause of action or defense alleged against him, or assume the risks of motions and demurrers. In seeking such relief by motion, he is likely to find himself floundering between Scylla and Charybdis; and, on demurrer, he may never anticipate what inferences the court may make in order to sustain the pleading. As there are no well-defined limits within which inferences must be confined, and as few men, much less judges, draw the same inferences from the same facts, the operation of the rule has occasioned the practical annihilation of the science of pleading in this State and degraded the practice of the law in this matter to the uncertainties of a game of shuffle-board.

The complaint now before the court is a fair example of what may be accomplished with reasonable safety under this system. I think I may say, without unkindness, that the pleader had no clear or distinct idea of any particular cause of action. Indeed, the situation was one likely to puzzle the most astute pleader. Hence he has alleged all kinds of facts, material and immaterial, and left the defendant to the hazard of making necessary distinctions. The effort has been so far successful, for the defendant in his brief seems bewildered as to whether he has been sued for a revision of a contract, for fraud in making false representations, as a partner for contribution, or in assumpsit for debt. In the language of a recent decision, the complaint foreshadows them all, and, on demurrer, the court must cast about among the facts and draw all inferences that may be fairly drawn and, from the compost so constituted, spell out, if possible, any one of the various causes of action known to the law. It would thus seem that the law is more tender toward an ineffectual pleading than to anything else.

But it will not be necessary to discuss all the various causes of action foreshadowed by this complaint. It will be safe to assume that, if it does not state a cause of action by

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one member of a joint undertaking against another for contribution, or a cause of action for debt, it will not support any cause of action whatever.

As touching a cause of action for contribution, the complaint sets forth a contract between the defendant and the plaintiff's assignor in the following terms:

"We have mutually agreed that of the total amount of the La Chivie mining stock received by the said Mr. Pratt for the Algonquin, Aladora and the Edna properties in Saratoga Springs, for which was paid net $2.50 per share, that any loss sustained by the said Mr. Pratt shall be shared jointly and equally between the two parties aforesaid; also any profits derived therefrom in advance of $2.50 per share shall also be divided equally between the two parties."

The pleader has not attempted to construe this contract by any allegation as to its legal effect; therefore it is the contract itself from which the plaintiff's right of action must be inferred. It clearly constituted the parties joint undertakers in the stock venture. They were to share equally in the profits and losses. Each party had the right to call the other to account; the one as to losses sustained and the other as to the profits derived. And, although the complaint fails thus to allege, I think it might well be inferred from the other allegations and the facts regarded as sufficient to constitute a cause of action for terminating the joint engagement, for an accounting of the profits and losses and for contribution. But the plaintiff has not demanded such a judgment. The prayer for relief is for a sum of money only, as in debt, and such a judgment the plaintiff cannot take on failure to answer. The complaint is, therefore, insufficient to support a cause of action for accounting and contribution.

The next question is whether the complaint will sustain a cause of action for debt in accordance with the prayer. But debt cannot be predicated from the contract. The promise is to share in profits and losses. Debt must be predicated, if at all, upon an implied promise to pay the loss sustained. But, before such a promise may be inferred, there must be conceded facts of loss and its amount. The

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facts alleged and from which such implied promise is said to spring are the joint undertaking concerning the stock, the agreement to share equally in the profits and losses, and that the stock has proved worthless. It may be true that, if plaintiff had alleged a sale of the stock at a figure below two dollars and fifty cents per share, a promise might be implied that the defendant would pay him one-half the difference between the fixed value and the rate obtained on the sale, as the loss might then possibly be determined by computation. But may an allegation of worthlessness stand in lieu of an actual sale to support such a promise? The defendant by his demurrer concedes only what is alleged, and for the purposes of this decision it must be taken as true that the stock is worthless and that plaintiff has been unable to sell the same at any price whatever. This being so, may we infer from the contract and these facts a promise by defendant to pay to the plaintiff, or his assignor, a sum equal to half the stock at the fixed valuation? I think there can be no doubt as to the answer to that question.

It is clear from the contract that the parties contemplated both the holding and sale of the stock. Their corresponding rights and obligations have concern with profits and losses resulting in the usual manner, either by use or sale. The term of use is not fixed; the manner or time of sale is not mentioned. They both had rights concerning either. As between themselves they were technically copartners. There is no claim that the defendant had knowledge of the worthlessness of the stock or any fact from which it may be inferred that he is not entitled to the usual rights of a joint undertaker. The expressions "sustained" and "derived," employed with reference to losses and profits, indicate that the parties contemplated the determination of such losses and profits by actual transactions or adjustments and not by a mere allegation of worthlessness. So long as the title to the stock remains with the plaintiff or the parties under the contract, its value is not definitely determined, nor can profits or losses be said to have resulted. It may be worthless to-day and of great value to-morrow. The contract does not contemplate any right in the plaintiff to select

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a day to determine its value and impose liability upon defendant for the difference between that value and the value fixed by the contract. It was not his agreement to maintain the market value of the stock at or above two dollars and fifty cents per share. If it were, then defendant might, if the price advanced, sue for the difference as profits without a sale. To infer a promise on the part of either to pay such difference as the profit or loss, upon a mere affirmation of the appreciation of the market or the worthlessness of the stock, would be to do violence to the terms of the contract and enable the parties to recover, in actions at law, the relief they should seek in a court of equity. I am, therefore, of the opinion that the complaint does not set forth facts sufficient to constitute an action for debt.

As there seems to be no occasion to search for any other form of action, it follows that the complaint does not contain facts sufficient to support any cause of action; and, therefore, the demurrer is sustained, with costs, the plaintiff to plead over on usual terms.

Ordered accordingly.

JOHN L. JONES, Plaintiff, *v.* THE NASSAU SUBURBAN HOME CO., Defendant.

(Supreme Court, New York Special Term, February, 1907.)

Injunction — Actions for injunctions — Parties — Defendants.
Corporations — Actions against corporations — Parties in action against — Joining stockholders.
Parties — Defendants — Who must be joined.

A complaint, which alleges that certain persons not parties to the action received stock of the defendant corporation in consideration of their personal promissory notes and in violation of section 42 of the Stock Corporation Law; that said persons are a majority of the directors of the corporation and in control thereof and, by means of the stock which they have thus illegally received, can control the pending election of the corporation, and which concludes by praying that the defendant be enjoined from permitting votes to be cast on said stock, is demurrable upon the ground of a defect of parties defendant.

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ACTION to restrain corporation from permitting votes to be cast on certain corporate shares.

William A. Schumacher, for plaintiff.

Kiendl Brothers, for defendant.

BLANCHARD, J. The complaint alleges that certain persons not joined as parties to the action, named Van Nostrand and Ollivier, received stock of the defendant corporation in consideration of their personal promissory notes and in violation of section 42 of the Stock Corporation Law; that said persons are a majority of the directors of the corporation and are in control thereof and, by means of the stock which they have thus illegally received, can control the impending election of the corporation, and concludes by praying that the defendant corporation be enjoined from permitting said stock "from being retained and votes thereon cast at this or any other subsequent election," and that said persons be compelled to return said stock to the corporation. The defendant demurs on the ground that there is a defect of parties defendant and that the complaint fails to state a cause of action. Since Van Nostrand and Ollivier are not parties to this action the prayer that the corporation cease to permit their stock being retained, and that they be compelled to return said stock to the corporation, is obviously unavailing. Whatever cause of action can be spelled out of the complaint must be predicated upon the prayer that the defendant corporation be enjoined from permitting votes on said stock to be cast at this or any subsequent election. Exhaustive examination of the authorities shows that in suits to restrain specified stockholders from voting at corporate elections the stockholders so specified have generally been made parties. See High Inj. (4th ed.), § 1230; Cook Corp. (5th ed.), § 738, and cases cited. In Walker v. Devereaux, 4 Paige, 229, application was made to restrain the defendants, all of whom were the commissioners of a duly organized corporation, from holding the first election of the corporation on the ground that the defendants had illegally al-

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lotted the stock to the subscribers. The application was denied for the reason that the complainant's bill was defective both in form and in substance. The court admitted (247) its power to prevent the election by an injunction operating merely upon the commissioners, but declared that the defendant commissioners "are not the trustees and do not represent the interests of other persons to whom stock has been assigned," and added that only "in a case of imperious necessity, when the complainant did not know or could not know the names of the other stockholders," would it thus interfere with the rights of others "who have no opportunity to be heard, either by themselves or by those under a legal obligation to protect their rights." Directors have been described as "trustees and representatives of the common property and the entire interests of all the stockholders of every class and description." Chase v. Vanderbilt, 62 N. Y. 307, 315. A purely corporate obligation, therefore, can be enforced without joining the directors or stockholders as parties. A corporate election, however, involves not only the obligations of a corporation to its stockholders but also the rights of the stockholders among themselves. Whether the rights of the stockholders in a corporate election are so involved as to make them necessary parties must, as was held in the case of Walker v. Devereaux, *supra*, depend upon the circumstances of each case. In Scholfield v. Union Bank, which is meagerly reported in 2 Cranch C. C. 115, the stockholders were apparently not considered necessary parties in such an action. In the present case the stockholders whose rights will be affected are directors of the defendant corporation and are in control. The situation somewhat resembles that presented in Brown v. Pacific Mail SS. Co., 5 Blatchf. 525, where Judge Blatchford said: "In regard to parties who have not been served the court cannot grant an injunction against them unless they are persons holding such a position as that they can be considered a single party for the purpose of restraining them from doing a particular act in which all are concerned — such as being members of a body of trustees or of the board of directors of a corporation."

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In the case cited the injunction against a corporate election which was served upon the corporation was accordingly held binding upon certain directors who had not personally been served. In the present case, therefore, the demurrer might properly be overruled so far as it rests upon the contention that there is a defect of parties defendant were it a certainty that when the decree prayed for in the complaint is made Van Nostrand and Ollivier would still be directors. This fact, however, cannot be presumed. Upon the authority of Walker v. Devereaux, *supra,* therefore, it must be held that there is a defect of parties defendant. Since the demurrer is sustained upon the ground mentioned it becomes unnecessary to examine the second ground of the demurrer.

Demurrer sustained.

THOMAS A. ENNIS and CHARLES F. STOPPANI, Composing the Firm of ENNIS & STOPPANI, Plaintiffs, *v.* CLARA A. GROVER, Defendant.

(Supreme Court, New York Special Term, February, 1907.)

Easements: Change of interest in estates — Right of purchaser of dominant estate; Extinguishment and revival — Extinguishment generally — Street between upland and wharfage.

Where, under a deed from the city of New York in 1847, the grantee of upland and bulkhead rights acquired, as appurtenant thereto, the wharfage rights immediately opposite the dominant tenement, and, upon a partition of the land in 1860 by the heirs of the grantee from the city, the deed of four lots to one of said heirs granted all the wharfage rights lying in front of the land conveyed to her, and the city in 1868 by a deed to the heirs of its grantee confirmed the deed of 1847, a specific devise of the four lots by the grantee of the deed in partition, by reference to their numbers in the partition map of 1860, embraces the wharfage and bulkhead rights opposite thereto although no specific reference thereto was made in the deed.

A separation of riparian rights from the upland will not be permitted because of the existence of a public street or road between the outer edge of the upland and tide water.

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ACTION for the enforcement of certain easements appurtenant to plaintiffs' lands.

Cleveland & Cleveland, for plaintiffs.

Remsen & Parsons, for defendant.

O'GORMAN, J. Under the general rule that a grant in gross is never presumed when it can be fairly construed as appurtenant to some other estate, it is quite clear that the wharfage rights in question were appurtenant to the land granted to William Hockman by the city of New York in 1847. Wharfage rights may constitute an easement in gross as was the case in Mayor, etc. v. Law, 125 N. Y. 392, but there the grantee did not own the upland at the point in controversy, and the court held, in view of the circumstances of the case, that the intention was to create an interest in the wharf which the grantee could enjoy himself or convey to any other person. The facts in this case are entirely different. The wharfage rights acquired by Hockman under the same deed which granted to him the upland and the bulkhead rights were immediately opposite to the dominant tenement. In the partition of the land in question by the heirs of Hockman, in 1860, four lots on the east side of Thirteenth avenue, being the north half of the block frontage between Eighteenth and Nineteenth streets, were conveyed to Eliza Hockman, and the deed by appropriate language granted all the wharfage rights lying in front of the land conveyed. In 1868 the city, by deed to the heirs of William Hockman, confirmed the deed of 1847. It is quite clear, therefore, that, as between the city and William Hockman and William Hockman's heirs, the wharfage rights were intended to be appurtenant to the land conveyed. In 1886 Eliza Hockman died leaving a will containing no residuary clause. Every gift or devise is specific. The lots fronting on the east side of Thirteenth avenue were devised by reference to their map numbers in the partition map of 1860. No specific reference was made to the wharfage or bulkhead rights. Thereafter all the heirs of Eliza Hockman,

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except the defendant, quitclaimed to the devisee all interest in the wharfage or bulkhead rights. The defendant claims that these rights did not pass under the will to the devisee of the land and that, as to these rights, the said Eliza Hockman died intestate. But an easement which has become appurtenant to land, either by grant or by prescription, will pass by a grant of the land whether or not the easement is expressly mentioned in the deed or the land is conveyed with its appurtenances; and this is true although the easement is not strictly necessary for the enjoyment of the thing conveyed. 10 Am. & Eng. Encyc. of Law, 418. Under the familiar doctrine that the court favors a construction that prevents partial intestacy, it requires no strained construction to conclude that Eliza Hockman intended to devise her bulkhead rights adjacent to the lots on the east side of Thirteenth avenue devised by her. These rights belonged to the dominant tenement; they were conveyed with the upland in the original grant. Their existence was recognized by the city and by the heirs of the original grantee, including Eliza Hockman, as appurtenants. It appears from her testamentary disposition that she intended to dispose of all her property. There is nothing to indicate a design to sever the easement from the uplands, and the devise of the lots should be held to embrace the wharfage rights opposite thereto. Thirteenth avenue was merely the boundary line of the city along the water front and is not to be treated as a separate and distinct parcel of land. The existence of a public street or road between the outer edge of the upland and the tide water will not be permitted to separate riparian rights from the upland. Langdon v. Mayor, etc., 93 N. Y. 130. The defendant has no interest in the easement and the demurrer is overruled, with costs.

Demurrer overruled, with costs.

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Misc.] Supreme Court, February, 1907.

Marshall McCoy, Plaintiff, v. W. James McClarty et al., Defendants.

(Supreme Court, Washington Special Term, February, 1907.)

Towns: Power of towns, government and town meetings — Power of majority of electors to validate claims; Audit and allowance of claims against towns — By vote of town meeting — When not conclusive; Rights and liabilities on contracts — Liability for services of attorney.

Highways — Road officers — Highway commissioners — Reimbursement for necessary expenses.

Municipal corporations — Remedies of taxpayers and corporators — Action by taxpayer — To prevent payment of illegal claim.

Estoppel — Equitable estoppel and estoppel in pais — Operation and effect — Public and individual acts and rights.

Where town highway commissioners receive notice of an application for the appointment of commissioners to lay out a proposed new highway they may present the matter to the town board and that body may, by resolution, employ counsel to defend the application in behalf of the town.

Where town highway commissioners, upon the written request of the individuals composing the town board, with the intention to serve the best interests of the town, employ counsel to oppose the laying out and building of a proposed new highway, in which opposition they are successful, largely to the benefit of the town, they should settle with their counsel for his fees and disbursements and present a claim therefor to the town auditors as a necessary expense incurred in the discharge of their duties as highway commissioners; and, upon a disallowance or unreasonable reduction of their claim before allowance, their remedy is by certiorari.

The rejection of a claim against the town, made directly by the attorney for his services and submitted to the town meeting, is not a rejection of a claim of the commissioners of highways for disbursements to counsel.

In an action brought in the County Court against the highway commissioners as individuals, for services as counsel in opposing the laying out and building of the proposed new highway, a notice addressed to the individuals upon whose request plaintiff was employed, to the effect that they should defend the suit and would be held liable both individually and as members of the town board for any damages and costs sustained by the defendants in the action by reason thereof, is not sufficient notice to the town to come in and defend; the town at that time having no interest whatever in defending the claim sued on.

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After affirmance by the Court of Appeals of a judgment in such action in the plaintiff's favor, by which the amount of his claim for services and expenses in the proceeding to lay out the highway was fixed at $435.60, a special town meeting voted that the town board pay and reimburse the commissioners for all liability incurred and sums of money paid, laid out and expended by them or either of them in defending the action and in satisfying the judgment and thereafter a claim by the commissioners of highways for $1,345.62 was allowed by the town board at $1,130.72 which amount was returned to the board of supervisors to be included in the tax levy of the town. In an action by a taxpayer to have the action of the special town meeting relative to the allowance of said claim declared illegal and void and the audit and allowance thereof by the town board declared illegal and void and to restrain the board of supervisors from including the amount allowed therein in the tax levy against the town, held, that the only legal obligations against the town were those for attorney's fees and expenses incurred in the proceeding to lay out and build the highway; that the expenses of the attorney's action against the commissioners of highways and the expenses upon the appeals in the case were not expenses incurred for the use or benefit of the town and that the majority of the taxpayers at a special town meeting could not make them valid claims against the town; that the fact that the plaintiff in the taxpayer's action was one of the individuals who signed the request to the commissioners of highways to contest the laying out of the proposed new highway did not estop him from prosecuting the action, as such request was in no sense a consent that the expenses of the action by the attorney to recover for services or upon the appeals from the judgment in his favor should be incurred.

TAXPAYER'S action. The opinion states the case.

Erskine C. Rogers (John E. Sawyer, of counsel), for plaintiff.

J. B. McCormick (John L. Henning, of counsel), for defendants.

VAN KIRK, J. This is an action brought by a taxpayer of the town of Hartford, Washington county, and State of New York, to have a certain vote, taken at a special town meeting, relative to the allowance of a claim against the town, declared illegal and void, to have the audit and allow-

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ing of said claim by the town board declared illegal and void and to restrain the board of supervisors from including the amount so allowed in the tax levy against the town of Hartford, and to restrain other public officers from issuing a warrant and collecting the tax, and for such other relief as may be just.

The action is brought under the Laws of 1892, chapter 301, section 1. The facts briefly stated are as follows:

In May, 1901, an application was made to lay out a certain highway in the town of Hartford. A petition was presented, upon notice to the commissioners of highways, to the county judge, for the appointment of three commissioners to determine upon the necessity of such highway.

Under date of May 15, 1901, is the following: "That the undersigned town board of the town of Hartford do hereby respectfully request that the commissioners of highways of said town shall oppose the laying out and building of the new proposed highway leading from Adamsville to Hartford and do all they can to prevent the same," which paper is signed by the individuals composing the town board. It is admitted that this paper was not signed at any meeting of the town board, and that the town board, as a body, never took any action thereon.

The highway commissioners employed Fred A. Bratt, Esq., as their attorney and opposed the laying out of the highway, in which opposition they were successful, largely to the benefit of the taxpayers of the town of Hartford. The opposition on the part of the highway commissioners to laying out this highway, their conduct in employing counsel and their services, were undisputedly all in good faith and with the intent to serve the best interests of the town of Hartford.

In December, 1902, a proposition to raise $325 to settle the claim of Mr. Bratt, for legal services and disbursements in the proceeding to lay out the highway, was submitted at a town meeting to the voters of the town of Hartford, but was rejected. At this time, under the undisputed facts of the case, Mr. Bratt had no valid claim against the town directly.

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The town board, when said claim was later presented to it, refused to allow the claim of Mr. Bratt, and mandamus proceedings were then instituted to require the board to audit and allow his bill. The application was denied by Judge Houghton who suggested that Mr. Bratt compel the highway commissioners to pay for his services and then present the matter to the board of town auditors. To compel such payment, an action was begun by Mr. Bratt against those persons who were the highway commissioners of the town of Hartford, as individuals. The value of the services of Mr. Bratt and the amount of disbursements were not seriously contested in this action. The subject of the contest was whether or not the commissioners of highways were the employers of Mr. Bratt and whether or not judgment could go against them as individuals.

Under date of July 27, 1903, the defendants in said action in the County Court prepared a notice addressed to Hiram Hall and five others, as individuals, who were the same persons who had signed the paper dated May 15, 1901, all but one of whom were members of the town board on July 27, 1903. This notice informed said individuals that the action had been brought by Mr. Bratt to recover the sum of $379.30, with interest from October 20, 1902. The notice continues: "We shall look to you to defend this action and shall hold each and every one of you, both individually and as members of said town board, for any damages and costs which may be sustained by us by reason of said action." This notice was not a sufficient notice to the town of Hartford to come and defend, nor at that time did the town of Hartford have any interest whatever in defending the claim of Mr. Bratt, unless, on account of matters which might thereafter arise, it had an interest in the amount claimed by Mr. Bratt.

On June 11, 1904, judgment was entered in this action in favor of Mr. Bratt against the defendants, individually, for $410.50. Thereafter an appeal was taken to the Appellate Division, where the judgment was affirmed, April 6, 1905, with $116.76 costs. Thereafter an appeal was taken to the Court of Appeals, where the judgment was

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affirmed, June 21, 1906, with costs in the sum of $103.86. These appeals were taken without any action whatever upon the part of the town board of the town of Hartford which in any manner authorized the appeals or by which the town recognized or incurred any liability.

Thereafter, in September, 1906, upon the application of twenty-five taxpayers of the town of Hartford, a special town meeting was called to vote upon the following proposition: "Shall the said town of Hartford, New York, pay, indemnify and reimburse its former commissioners of highways, namely: James McClarty, Alfred C. Gibbs and Earl Kinney, for all liability incurred and sums of money paid, laid out and expended by them or either of them, in the defense of and in defending the suit and action brought against them by Fred Bratt, and in satisfying the judgments recovered by said Bratt in said action and suit against them? And, shall the town board of the town of Hartford audit and allow the just and reasonable sums so paid, laid out, expended and incurred?"

A vote was taken on the proposition and a majority voted "Yes." Thereafter, in November, 1906, the said McClarty and others presented a claim for $1,345.42, which was allowed by the town board at $1,130.72. This amount was returned to the board of supervisors, to be included in the tax levy in the town of Hartford, when this action was begun and a temporary injunction issued restraining the board of supervisors from including said sum in the tax levy and warrant.

The highway commissioners are the only officers of the town to whom notice must be given in proceedings to lay out a highway. Being thus made parties to the proceedings, it was the duty of the highway commissioners to examine into the facts and act for the best interests of the town. The better course for the highway commissioners to have pursued, when they received notice of the application for the appointment of commissioners to lay out this highway, was to present the matter to the town board; and, if that body determined that a defense should be made, the town board by resolution could have employed counsel

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in behalf of the town. This, however, was not done in this case. The highway commissioners could, if proper and necessary, and acting in good faith and without collusion, employ counsel to aid them in opposing the laying out of this highway. This the highway commissioners did. The attorney, however, was employed by them as individuals and not by the town. The court, in People ex rel. Van Keuren v. Board of Town Auditors, 74 N. Y. 310, said, speaking of highway commissioners: "They have no general power or authority to bind the town by their contracts or undertakings and are individually responsible alone to those with whom they contract, if any responsibility is thereby created."

The attorney must present his bill for services to the highway commissioners, who then should settle with the attorney for his fees and disbursements and present the claim therefor as a necessary expense incurred upon their part in the discharge of their duties as highway commissioners. If the town auditors refused to allow the claim, or if the claim was unreasonably reduced before being allowed, the remedy on the part of the highway commissioners was by certiorari. People v. Barnes, 114 N. Y. 317; People v. Vanderpoel, 35 App. Div. 73; People v. Supervisors, 82 Hun, 298.

If the highway commissioners could not settle with their attorney because his charges were too large, then they could refuse to pay him and he could resort to the courts to establish his claim against them and the amount thereof; but, upon the facts known to the commissioners and their attorney at the time the action in the County Court was brought, the only question that could fairly be raised was as to the amount of the fees and disbursements of the counsel.

The above procedure to establish the claim of Mr. Bratt as a valid claim against the town of Hartford is so plainly indicated by the statutes and the decisions in this State, that it ought to have been recognized as the proper course of procedure. The highway commissioners did not apparently attempt to settle with Mr. Bratt; but Mr. Bratt, under the suggestion of Judge Houghton, brought his ac-

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tion and recovered a judgment against the individuals who were the highway commissioners. The highway commissioners have never presented a claim to the board of town auditors for the services and expenses of Mr. Bratt in the highway proceeding as expenses necessarily incurred and paid by them in performing their duties, unless in the claim presented after the vote at the special town meeting.

The question then before the court is, whether or not facts have been shown on which the claim, as audited at $1,130.72, or any part thereof, can be included in the tax levy against the town of Hartford and collected from the taxpayers.

We think it was not necessary, though proper, for the highway commissioners to get the consent of or authority from the town board to employ counsel to defend the laying out of the highway, and such consent or authority was never procured. So that Mr. Bratt was never retained by the town of Hartford in said proceeding.

The vote at the first town meeting upon Mr. Bratt's bill against the town is not a rejection of the claim of the commissioners of highways for disbursements to counsel, because the claim was then voted on as a claim against the town, directly, by the attorney and not as a claim by the highway commissioners for expenses incurred by them. That vote, therefore, was not a rejection of any claim or amount at issue in this action.

We think it is fair to say that the commissioners have now paid their counsel, their bill has been presented to the auditors and the bill has been allowed at $1,130.72.

This court cannot act as auditor for the town of Hartford, but it has to determine whether or not the items, not the amounts, allowed, are lawful to be collected by tax.

The real question tried in the County Court was, not the amount to be allowed to the attorney, but whether or not the commissioners, as individuals, or the town board, as individuals, were first liable to Mr. Bratt. In that question the town was in no sense interested and was not represented by counsel. None of the expenses of this action was for the benefit of the town, nor were any of the

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disbursements the disbursements of a town officer while discharging his duties as a town officer. If it was of sufficient interest to the highway commissioners to determine whether or not the expenses for the counsel in the highway proceeding should be presented as a disbursement of the highway commissioners, to incur the expenses of a law suit, the town cannot be called upon to pay those expenses. No sufficient notice was given to the town to come in and defend, nor was there reason to expect that the town would come in upon the issue there being tried.

The defendants in this action can hardly claim that the town could hope to put the expense for their attorney upon the individuals composing the town board, and then claim those individuals could have no allowance for disbursements in a matter exclusively within the duty of the highway commissioners. But, unless the town could take such position, it had no interest in the issue to be tried. The defendants are claiming that the expense for counsel in the highway proceedings was incurred in good faith and for the best interests of the town and resulted largely to the benefit of the town. Likewise, in the appeals, the town had no interest. There was no claim against the town then. There was no issue, certainly, in the appellate courts as to whether or not the amount of the attorney's bill should be lessened. Not until that bill had been paid and presented as a disbursement of some officer could the town be called upon to pay it. The only possible interest the town could have was in defeating the claim entirely, and the defendants, as above stated, could not be heard to such an end in this action. So that the disbursements at the trial in the County Court and upon the appeals are not legal claims against the town. The only proper items for disbursements before the board of town auditors were those for counsel fees and expenses in the proceeding to lay out the highway, unless the disbursements at the trial in the County Court and upon the appeals have been made a legal claim against the town by the vote at the special town meeting in September, 1906.

So the question arises: Could a majority of the tax-

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payers, attending said special town meeting, vote upon the town such a liability? A majority of taxpayers of a town attending at a special town meeting cannot by their vote make all kinds of claims legal claims. And, if a majority favor the payment of an illegal claim, any taxpayer may thereafter test the claim in the courts.

A town meeting has only such powers as the statute gives it. A voter may in perfect security remain away from a town meeting, relying upon the fact that the voters cannot vote an illegal claim upon the town.

After a careful examination of the statutes and of the authorities, I am constrained to hold that the only claims which can be made legal obligations against the town of Hartford, under the circumstances of this case, are the claims for attorney's fees and expenses incurred in the proceeding to lay out the highway. All the other expenses included in the bill audited as above are expenses concerning matters in which the town had no interest whatever, which could not result for the best interests of the town, and, therefore, concerning which the town board could not have employed counsel to represent the town and by so doing have bound the town. The expenses in the County Court upon the issue there raised and the expenses upon the appeals were not expenses incurred for the use and benefit of the town, and the taxpayers at a special meeting could not make claims therefor valid claims against the town.

The expenses of the attorney and the disbursements during the highway proceedings are expenses which may come within the expression "necessarily incurred for the use and benefit of the town;" but the other expenses, although apparently authorized by the vote at the special town meeting, are not expenses "for any town purpose," nor in any sense "for the use and benefit of the town." The items contained in the bill are not such as may be submitted to a special town meeting to make them legal claims against the town, even though a majority of the taxpayers attending vote that the town should pay them. They are not items which are directed by law to be raised for any town pur-

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pose; nor do they include judgments duly recovered against the town; nor are they damages recovered against town officers for any act done in pursuance to the direction or resolution of the town board, or of a town meeting; nor are they damages against a public officer for any act done in good faith in his official capacity, without such direction or resolution of the town board or a town meeting; nor are they costs and expenses, lawfully incurred by any town officer, in prosecuting and defending an action or proceeding brought by or against the town, or against a public officer for an official act done where the said officer is required by law to prosecute or defend.

The defendants urge that the town might have authorized the highway commissioners to defend the action in the County Court and to take the appeals; and, therefore, although they did not so authorize them, they might thereafter ratify the acts in defending the action and taking the appeals. This contention is answered above. Rockefeller v. Taylor, 69 App. Div. 176, 183–185.

The special town meeting authorized the town board to audit the claims. The vote at that special town meeting, however, cannot be construed to authorize the town board as the board of town auditors to make an illegal claim a legal one against the town. The town board has audited two items which are legal and proper, namely: For counsel fee and disbursements during the proceeding to lay out the highway, and the amount allowed for these items may be raised by tax. The attorney's bill for fees and expenses in the proceedings to lay out the highway is fixed by the judgment in the County Court at $435.60. This item is allowed by the town board in its audit of the claim and is legal and valid. This I am aware includes costs in the County Court, but, inasmuch as the jury did not allow the full amount claimed by the attorney for his services and so did pass upon the value of his services, although no direct evidence on the value of the services was presented by the defendants, I am disposed to hold that the judgment in the County Court fixes the just amount of the claim.

The defendants urge that the plaintiff in this case is

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estopped from prosecuting this action because he signed the exhibit dated May 15, 1901, requesting the commissioners of highways to oppose the laying out and building of the new proposed highway. This writing, at best, was only the consent of the plaintiff that the highway commissioners should employ counsel to contest in that proceeding, which was an entirely proper thing to do. It in no sense consented that the expenses in the County Court or upon the appeals should be incurred. The plaintiff is not estopped from prosecuting this action.

The plaintiff is entitled to judgment permanently enjoining the defendants and each of them from including in the tax levy against the town of Hartford any item of said bill other than the said judgment, $435.60, with interest, and adjudging that the claim, as audited, except as to said amount, is illegal and not a valid claim against the town of Hartford, with costs against defendants McClarty, Gibbs and Kinney.

I do not intend to hold that any necessary expenses, actually paid by the commissioners during the proceedings to lay out the highway, are improper charges against the town of Hartford, but I am unable from the evidence to distinguish any such items in the claim allowed.

Allowing the costs in the County Court judgment is hardly consistent with my views in the case; but, by so doing, the verdict of the jury as to attorney's fees and disbursements is accepted, and the town should pay the reasonable expenses of defeating the laying out of the highway without putting the highway commissioners to further expenses.

Judgment accordingly.

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THE KNICKERBOCKER TRUST CO., Plaintiff, v. ADRIAN ISELIN, JR., Defendant.

(Supreme Court, New York Special Term, February, 1907.)

Corporations — Personal liability of officers to creditors — In general — Liability of officers of foreign corporations.

An action to enforce the liability under the statute of Maryland of a stockholder of an insolvent Maryland corporation for its debts must be brought in that State and lies only by a bill in equity in the nature of a creditor's bill filed against the corporation by one or more creditors on behalf of themselves and of other creditors of the corporation who may come in and make themselves parties thereto; and the complaint in an action brought in this State by a single creditor to enforce such liability will be dismissed for want of jurisdiction.

DEMURRER to the complaint in an action to enforce against a stockholder of a Maryland corporation a statutory liability to its creditor alleged to be created by the laws of Maryland.

Davies, Stone & Auerbach, for plaintiff.

Whitridge, Butler & Rice, for defendant.

BLANCHARD, J. This is an action brought by the plaintiff, a creditor of the City Trust & Banking Company, a Maryland corporation, to enforce against the defendant, a stockholder of said corporation, a statutory liability alleged to be created under the law of Maryland in an amount equal to twice the par value of the defendant's stock in said corporation. The former complaint alleged that under the Maryland law "as defined, construed, administered and enforced by the courts of that State," the defendant is liable as aforesaid. The defendant demurred to this complaint, and upon appeal the demurrer was sustained. Knickerbocker Trust Co. v. Iselin, 185 N. Y. 54. The plaintiff has accordingly amended its complaint, and has set forth in greater detail the Maryland statutes in question and what

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the Maryland courts have construed said laws to mean, and has affirmatively pleaded that the defendant has not brought himself within the purview of such of said statutes as appear to provide a remedy in substitution of that relied upon by the plaintiff. The defendant demurs to this complaint on the ground that the court has no jurisdiction, and that there is a defect of parties plaintiff and defendant, and that the complaint does not state facts sufficient to constitute a cause of action. The Court of Appeals, in its opinion above cited, sustains the demurrer to the former complaint upon two grounds: First. That according to the rule of Marshall v. Sherman, 148 N. Y. 9, "the liability of stockholders in such cases is not a contract but a statutory liability to be enforced primarily at the home of the insolvent corporation, and in the state creating the obligation; and, second, that by reason of Maryland legislation in force "when this action was commenced it would not lie at the home of the insolvent corporation in its present form," but only by a "bill in equity in the nature of a creditor's bill filed against such corporation by one or more creditors on behalf of themselves and of other creditors of the corporation who may come in and make themselves parties thereto." It is not apparent that the present amended complaint meets either of these grounds of action. The contention of the plaintiff that the defendant has not brought himself within the purview of the statute that provides a remedy in substitution of that relied upon by the plaintiff is inconsistent with the language of the opinion of the Court of Appeals upon the former appeal, and even if the decision upon the former appeal were not regarded as controlling it seems that the policy of our courts, as shown in the decision in Marshall v. Sherman, *supra,* is decisive against the contention of the plaintiff.

Demurrer sustained.

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PRATT, HURST & Co., Limited, Plaintiff, v. EDWARD N. TAILER et al., Defendants.

(Supreme Court, New York Special Term, February, 1907.)

Election of remedies — Inconsistency of remedies — Different remedies where rule of inconsistency is not violated.

Landlord and tenant — Rights, duties and liabilities in regard to the premises — Injuries from defective condition — Actions for injuries from negligence.

An allegation in the complaint, in an action against a landlord for damages caused by leaks in the roof of the demised premises, that defendant had expressly agreed to protect the plaintiff from such damages, does not constitute an election to sue upon contract; and a judgment merely dismissing said complaint is not a bar to an action in tort for damages caused by the same leakage.

ACTION by tenant against landlord for damages in negligently causing leak in roof of demised premises.

Morgan T. Mitchell, for plaintiff.

Winston H. Hazen, for defendant.

BLANCHARD, J. The complaint alleges that by a written lease the plaintiff became the tenant of certain premises owned by the defendants, its lessors, and entered into occupation thereof; that subsequently the defendants permitted certain third parties to install apparatus upon the roof of said premises; that by reason of the unworkmanlike manner in which that apparatus was installed the roof of said premises was injured, and by reason thereof the plaintiff's goods were damaged by leaks in the roof. The complaint prays for damages as a result of said leakage. The defendants' answer to the complaint sets up that in a former action brought by the plaintiff to recover damages caused by the same leakage the complaint was dismissed by the court, and that said former action constituted an election to sue upon contract and not upon tort, and that said judgment was a bar to the present action. The judgment-roll annexed

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to the answer of the defendants shows that in the former action the plaintiff's complaint differed from the complaint in the present action in that it contained a paragraph alleging specifically that the defendants would keep the roof of said premises in repair. Since the complaint in the former action was merely dismissed it is clear that the plaintiff is entitled to prosecute an action for recovery of damages by reason of the same injuries upon a different complaint. The defendants' contention that the prosecution of the former action was an election by the plaintiffs to sue upon a contract rather than upon a tort is untenable. The mere circumstance that in the former complaint an allegation was inserted that the defendants had expressly agreed to protect the plaintiff against the damages which occurred by reason of leakage is not inconsistent with the common-law liability of the defendants as landlords to protect the plaintiff in the quiet and peaceable enjoyment of the premises. The plaintiff might well prosecute its action on one or the other of these liabilities or upon both. A party cannot be estopped from prosecuting his action unless he has elected to proceed upon a theory entirely inconsistent with the one which later he endeavors to proceed upon. Within the rule of Crossman v. Universal Rubber Co., 127 N. Y. 34, 37, the plaintiff herein is not barred from prosecuting its action upon the present complaint.

The demurrer is, therefore, sustained.

Demurrer sustained.

FRANK GICK, as Executor, Etc., of ROSINA STUMPF, Deceased, Plaintiff, *v.* FRANK STUMPF, Defendant.

(Supreme Court, Saratoga Trial Term, February, 1907.)

Gifts: In general — Particular instances — Funds in bank; Delivery and acceptance — Evidence.

A mother, about a year after her account in savings bank standing in the name of her son, as her trustee, had been changed to him as an individual, executed, in the presence of two subscribing

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witnesses and with full knowledge of its contents, a writing containing a positive declaration that, of her own free will and without influence exercised upon her, she had given the money in the savings bank to her son and delivered it to him and put him in the absolute possession and ownership thereof and which paper further ratified and confirmed said gift to the son and declared that it was made with full understanding of its effect and that said gift was made as a simple act of justice to her son and that he had become the absolute owner of said money. By her instructions this paper was delivered to the son. Held, that the evidence showed a valid gift *inter vivos*.

The mother by her will and codicil thereto, executed respectively one and two years after said declaratory paper and subsequently admitted to probate, declared that said money in the savings bank was at the time of the execution of the will held by the son in trust for her and was specifically bequeathed to legatees named. In an action by her executor against the son for an accounting and to set aside the declaratory paper and to recover the amount of the bank deposit with interest, held, that the said declaratory paper would have been conclusive upon the testatrix until attacked and explained away; and, there being no sufficient evidence against its validity in this action, defendant was entitled to judgment dismissing the complaint.

ACTION for an accounting and to set aside an instrument declaring a gift.

Chambers & Finn, for plaintiff.

George B. Lawrence, for defendant.

VAN KIRK, J. This is an action brought by the executor of Rosina Stumpf for an accounting, to set aside a certain paper dated March 29, 1901, and to recover from Frank Stumpf, the defendant, the sum of $1,200, with interest.

On the 25th day of July, 1898, Rosina Stumpf had on deposit in the First National Bank of Glens Falls the sum of $1,200.30. The defendant, Frank Stumpf, appeared at the said First National Bank with a check or order signed by Rosina Stumpf and filled out except as to the amount of money. Upon this order there was delivered to Frank Stumpf by the bank the sum of 30 cents in cash and a draft upon a New York bank for the sum of $1,200. This

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draft was taken by Frank Stumpf and deposited in the Albany Savings Bank to the credit of Frank Stumpf as trustee of Rosina Stumpf. On or about July 6, 1900, the bank-book, standing in the name of Frank Stumpf as trustee of Rosina Stumpf, was presented to the Albany Savings Bank and the account was transferred to the name of Frank Stumpf, the amount deposited in his name being $1,241.35. The interest upon this account was credited from time to time and certain sums withdrawn, so that, upon the 1st day of January, 1907, the account showed a credit of $1,221.

On the 29th day of March, 1901, Rosina Stumpf executed, in the presence of George B. Lawrence and Amanda M. Low, as witnesses, a paper which may be described as a declaration or acknowledgment of a former gift. In the paper there are no words of transfer, but the paper contains the positive declaration that Rosina Stumpf, on or about the 1st day of July, 1900, of her own free will and without influence exercised upon her, gave the sum of money on deposit in the Albany Savings Bank in the name of Frank Stumpf, as trustee, to Frank Stumpf, and delivered said sum to him and put him in the absolute possession and ownership thereof. The paper goes on to recite that Rosina Stumpf by this paper ratifies and confirms the said gift and declares that it was made with full understanding of its effect and that the gift was made as a simple act of justice on the part of Rosina Stumpf toward her son and that her son became the absolute owner of the said moneys.

On the 9th day of January, 1902, Rosina Stumpf executed her last will and testament, in which she states as follows: "I wish to state that my son Frank Stumpf now has under his control on deposit in the Albany Savings Bank the sum of one thousand, two hundred dollars belonging to me. I also wish to state that the money and property given to my son Frank Stumpf in this instrument is to be in full satisfaction of any and all claims that he may have against me for board, care and all other services that may be furnished me by him or the members of his family."

On the 2d day of October, 1903, Rosina Stumpf executed a codicil to her said will, in which she recites that she had

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heretofore given to her son Frank Stumpf the sum of $100, and to her daughter Julia Fish the sum of $100, and to her son William A. Phillips the sum of $100. The evidence contains statements from the books of the First National Bank of Glens Falls showing that, in March, 1898, there had been transferred from the account of Rosina Stumpf to the account of Frank Stumpf the sum of $100, to the account of Charles H. Stumpf the sum of $200, and to the account of Julia M. Clark the sum of $100.

At the time the declaratory paper was executed in 1901, beside the two subscribing witnesses, Miss Boyce was in the house and, about the time the paper was executed, Rosina Stumpf, in substance, told to Miss Boyce that she had given her property (she then had only $1,200) to her son Frank; and she explained to Miss Boyce why Mr. Lawrence, a lawyer, had been to her room to do business with her. The two subscribing witnesses testify to the circumstances, that the paper was read over to Rosina Stumpf and that she signed it in the presence of each of the witnesses. The execution of this paper, and that Rosina Stumpf knew its contents and meaning, is sufficiently proved. The will and codicil, executed respectively one and two years after the said declaratory paper, have been admitted to probate and letters testamentary have been issued to the plaintiff; and, in the will, the testatrix specifically declares that the $1,200 in the Albany Savings Bank is, at that time (1902) held by her son in trust for her, and the will specifically gives to the legatees named the said $1,200.

There was some evidence in the case tending to show that, during the later years of her life, Rosina Stumpf became quite feeble and her eye-sight became poor, so much so that she at times was unable to write her name. Indeed, the codicil is signed by her mark in 1903. This evidence was offered on behalf of the plaintiff. I am unable to appreciate the force of the testimony, because the plaintiff rests upon the validity of the will and codicil. Otherwise he has no standing in court. And, if Rosina Stumpf was capable of making a will in 1902 and a codicil in 1903, and to resist influence then, she must have been capable of mak-

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ing the declaratory paper and resisting influence in 1901. The failing condition was progressive.

The evidence shows that, from April, 1900, until October, 1903, Rosina Stumpf made her home with her son Frank Stumpf. In October, 1903, she went to the home of her son Mr. Phillips, where she remained until March, 1904, after which she made various other visits and did not return to the home of her son Frank, except for a short stay, until about one week before her death in September, 1904; so that both the declaratory paper, executed in 1901, and the will, executed in 1902, were executed while she was making her home with her son Frank, although upon the day she executed her will she was in the village of Saratoga Springs. It would seem, therefore, that she was free to go and come while she made her home with her son Frank, and no inference of influence or restraint can be drawn from the circumstances of the case to discredit the paper dated March, 1901.

The serious question in the case is whether or not Rosina Stumpf had, in 1901, or prior thereto, made a valid gift of the said $1,200 to the defendant Frank Stumpf. The declaratory paper, executed in 1901, is a valid admission on the part of Rosina Stumpf that she had given and delivered the said money to her son, the defendant. In 1900, when the account in the Albany Savings Bank was changed from Frank Stumpf as trustee to Frank Stumpf as an individual, Rosina Stumpf had no control of the account. While the money was standing in the name of Frank Stumpf as trustee of Rosina Stumpf, Rosina Stumpf could not have drawn out the money; it was entirely in the control of the defendant; so that the fact of the transfer of the account, in itself, is evidence only of the act of Frank Stumpf, and is no evidence of an actual delivery by Rosina Stumpf to Frank Stumpf of the said $1,200. The evidence does not disclose how this delivery was made; the son was not a competent witness as against the executor and, therefore, his testimony as to the details of the gift was not offered. Although the declaratory paper contains no expression of transfer and is not in the form of a transfer of the title, Mr. Law-

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rence testifies that Rosina Stumpf instructed him to deliver this paper to Frank Stumpf and that he did so deliver it, and that, at the time this action was begun, Frank Stumpf retained the said Lawrence as his attorney and handed him the said declaratory paper.

The executor who brings this action brings it as the representative of Rosina Stumpf, and he has the same rights to recover that Rosina Stumpf would have had if living, and no other right. If this action had been begun by Rosina Stumpf in her lifetime, and the declaratory paper produced in evidence, it would have been conclusive upon Rosina Stumpf until attacked and explained away. In this action there is no sufficient evidence against the validity of the said paper. It seems to me that the fair test is this: If Rosina Stumpf had brought the action in the same form in which it has been brought by the executor and the same evidence produced, the said paper executed in 1901 would have been a complete defense; and it is, therefore, a complete defense to this action by the executor of the last will of Rosina Stumpf.

While there is no direct evidence of an actual manual delivery of the money by Rosina Stumpf to her son Frank Stumpf, the declaratory paper shows the intention to make the gift, and that the gift has been made. There was a sufficient constructive or symbolical delivery and the paper is evidence of a transfer of the title from Rosina Stumpf to the defendant. Beaver v. Beaver, 177 N. Y. 428; McGavic v. Cossum, 72 App. Div. 35.

The evidence of the gift is sufficient, considering the confidential relations between mother and son and the rule that the evidence under such circumstances must be "scrutinized with the extremest vigilance."

The evidence shows a valid gift *inter vivos*. The essential elements of such a gift are:

First. Intent to vest the title of the thing given in the donee.

Second. Delivery.

Third. Acceptance by the donee. Garner v. McGuire, 176 N. Y. 476; Beaver v. Beaver, 117 id. 421.

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The gift, having been once completed, the donor is divested of dominion over the thing given and could not revoke the gift. Cambreleng v. Graham, 79 Hun, 247; Beaver v. Beaver, *supra*, 429; Little v. Willets, 55 Barb. 125.

It is true that the mention of the $1,200 in the will indicates that, at the time the will was executed, the testatrix did not realize that she was not then the owner of the said $1,200; but there is nothing in the provisions of the will sufficient to justify the court in holding that the gift declared in the paper executed in 1901 was not a completed and valid gift.

The defendant should have judgment dismissing the complaint, with costs.

Complaint dismissed, with costs.

SUSAN F. ROBINSON, Plaintiff, *v.* CAROLINE S. KELSO and Others, Defendants.

(Supreme Court, Saratoga Special Term, February, 1907.)

Wills — Interpretation and construction — Expenses of the estate, charges, etc. — Rules and implications — Implied charges on land.

Where a testator, owning real estate, gives an annuity to his aged sister, but does not leave sufficient personal property to pay the annuity after the payment of his debts and funeral expenses, and it does not appear whether at the time the will was made the testator had sufficient personal property for such purpose nor how much, if any, will remain after paying debts and funeral expenses, and the will contains no expression making the annuity a charge upon the testator's real estate, and there are no extrinsic circumstances to aid the court in determining the testator's intent, and his language shows that he understood there would be personal property left after satisfying the bequest, held, that the will does not disclose an intention to charge the annuity upon testator's real estate.

ACTION to have legacy declared a charge upon real estate.

Thomas F. Galvin, for plaintiff.

James W. Verbeck, for defendants.

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VAN KIRK, J. This action is brought to have a legacy, given by John S. Kelso, deceased, to his sister, the plaintiff, in the form of an annuity of $200, declared a charge upon the real estate of which the testator died seized.

The case is submitted to be determined upon the pleadings, with the single exception that the attorneys have stipulated that the plaintiff is a sister of John S. Kelso, deceased, and is sixty-six years of age.

The complaint alleges that John S. Kelso died, owning certain real estate in the village of Waterford, Saratoga county, New York; that he died in June, 1904, leaving a will, which has been duly admitted to probate, dated October 25, 1900.

Paragraph 9th of the complaint is as follows: "That the plaintiff is informed and believes that the said John S. Kelso, deceased, left only a sufficient amount of personal property, out of which to pay his debts and funeral expenses, and that the amount of personal property left by said deceased, after the payment of his debts and funeral expenses, is not sufficient to pay plaintiff's annuity."

In paragraph 7th of the complaint, is the allegation that all the personal property of the said John S. Kelso, deceased, has been distributed among the creditors of the said deceased.

In the answer, paragraph 2d, the defendants deny that all the personal property of said John S. Kelso, deceased, has been distributed among the creditors of the said deceased.

Under the pleadings, therefore, and without any proof offered in the case, it is impossible for the court to hold that, at the time the said will was made, the testator did not have sufficient personal property to satisfy the bequest to the plaintiff. Also, the court is unable to say, under the pleadings and without proof, what amount of personal property, if any, the testator left after the payment of his debts and funeral expenses.

Regardless of the amount of personal property owned by the deceased at the time he made his will or left by the deceased at the time of his death, the plaintiff seems to rely upon the provisions of the will to show the intent of John

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S. Kelso to make the said annuity a charge upon his real estate. There is no expression in the will making the bequest a charge upon his real estate.

The first paragraph of the will directs the payment of all the just debts and the funeral expenses of the testator. The second paragraph gives the annuity of $200, payable quarterly from and after the date of his death. The third paragraph gives to the wife, Caroline Kelso, in lieu of dower, the use and income from two-thirds of all the rest, residue and remainder of the estate, real and personal and wherever situated, during the time she shall remain his widow.

The fourth paragraph gives all the rest and residue of the estate to his adopted daughter, Edna D. Jones. The last paragraph appoints executors.

There are no extrinsic circumstances in the case to aid the court in determining the intent of the testator in the respect in question. The beneficiary, who is to enjoy the annuity, is the sister of the deceased. She is now sixty-six years of age and, of course, it is presumed that the testator intended solemnly to provide for his sister; but there is nothing to show to the court that, at the time the will was made, the testator did not understand and believe that his personal property would pay the annuity. The widow is given the use of two-thirds of his estate, both real and personal. The annuity, therefore, was not intended to come from any part of this two-thirds. There is nothing to indicate to the court the value of this two-thirds of the estate, but the language shows that the testator understood there would be personal estate left. The allegation in the complaint that all the personal property has been distributed to creditors is denied by the answer, so that the court cannot conclude that there is no personal property, nor that one-third of the personal would not pay the annuity. The fact that the widow is given the use of two-thirds of the real estate and personal property is not sufficient to allow one to conclude that all of the other one-third, both real and personal, was to be applied to the payment of the annuity. The fourth clause of the will gives all the rest and residue of the estate to the adopted daughter, and there is nothing

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to indicate that the testator intended his adopted daughter to have nothing until the widow and sister of the testator had died.

Although it is apparent that the testator intended to provide for his sister, and although the court is inclined to give every favorable construction for the benefit of the plaintiff, considering her age and the fact that the bequest was solemnly made, still (without any proof as to the actual amount of personal property which the testator owned at the time he made his will and at the time of his death, or of any other circumstance outside the will) I am compelled to hold that the will itself does not disclose any intention upon the part of the testator that the said annuity should be made a charge upon his real estate. Morris v. Sickley, 133 N. Y. 456.

Findings may be prepared in conformity with this memorandum.

THE UNITED MERCHANTS' REALTY AND IMPROVEMENT COMPANY, Plaintiff, *v.* MAX J. ROTH, Defendant.

(Supreme Court, New York Special Term, February, 1907.)

Landlord and tenant — Landlord's title and reversion — Rights and powers of landlord — Assignment and rights of assignee.

Where a landlord who is the owner of the demised premises assigns the lease, together with his right to the control, occupancy and possession of the premises for a period of more than four years beyond the expiration of the term, and the tenant holds over, the assignee of the landlord occupies the relation of landlord to the tenant and may elect to treat the holding over as a tenancy for another year.

ACTION for rent. The opinion states the case.

Solomon M. Stroock, for plaintiff.

Mullan, Cobb & Mitchel, for defendant.

O'GORMAN, J. Defendant was a lessee under a lease from one Gerken, the owner of the premises in question, which ex-

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pired on May 1, 1906. Subsequently to the execution of the lease, Gerken duly assigned to the plaintiff, from and after May 1, 1906, the said lease and all his rights thereunder, together with the owner's right to the control, occupancy and possession of the premises for a period of five years beginning May 1, 1906. The defendant refused to vacate the premises upon the expiration of the lease, although requested so to do by the plaintiff, who thereupon elected to hold the defendant as a tenant for another year. In this action the plaintiff sues to recover rent for the months of May, June, July, August and September. The first five causes of action are for the five months' rent upon the theory of an implied renewal of the lease in consequence of defendant's holding over. Causes of action numbered six to ten rest upon an implied contract based upon the averment that plaintiff duly notified the defendant that his failure to surrender possession of the premises upon the termination of the demised term would be treated as an agreement to continue as a tenant for another year, and that the defendant by holding over thereby assented to the condition imposed by the plaintiff. The defendant demurs upon the ground that the facts stated do not constitute a cause of action. He claims that the relation of landlord and tenant did not exist between him and the plaintiff, and that the doctrine invoked by the plaintiff is inapplicable. The words "landlord" and "tenant" signify not only the immediate parties to a lease, but also their respective successors in interest. Formerly there was no privity of contract between the assignee of a lease and the tenant until the tenant attorned. Fowler's Real Prop. Law (2d ed.), 620. But attornment by the tenant is no longer necessary. Real Prop. Law, § 193. That section is entitled "Rights where property or lease is transferred," and provides that "The grantee of leased real property or the assignee of the lessor of such a lease has the same remedies by entry, action or otherwise for the nonperformance of any agreement contained in the assigned lease for the recovery of rent, for the doing of any waste, or for other cause of forfeiture as his grantor or lessor had or would have had if the reversion had remained in him." The design of the statute is to afford to the grantee

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of the fee or assignee of a lease all the rights of the original lessor. Van Rensselaer v. Ball, 19 N. Y. 104. The section also provides that the lessee or his assignee has the same remedy against the lessor, his grantee or assignee, for a breach under the lease that the lessee might have had against his immediate lessor. The assignment of the lease, together with all the owner's rights to the control and possession of the premises for the ensuing period of five years, established the relation of landlord and tenant as between the assignee and the tenant before the expiration of the defendant's term. If the plaintiff were a grantee of the premises, it will hardly be disputed that he would become the landlord upon the execution and delivery of the deed. Earle v. McGoldrick, 15 Misc. Rep. 136. Under the statute, the assignee of the lessor becomes entitled to precisely the same rights, and the relation of landlord and tenant is as effectually established. As the plaintiff, therefore, became the landlord under whom the defendant held the demised premises, the defendant could not dispute his title. All the incidents of the relation of landlord and tenant at once attached, and among these is the universally recognized right of a landlord, at his election, to treat a hold-over tenant as a tenant for another year. Schuyler v. Smith, 51 N. Y. 309; Moffatt v. Smith, 4 id. 128; Despard v. Walbridge, 15 id. 374; Preston v. Hawley, 139 id. 298; Coit v. Planer, 7 Robt. 416; affd., 51 N. Y. 647; for opinion Earl, J., see Abb. Sel. Cases Pl. 133. Despard v. Walbridge is quite similar in principle to the case at bar. There the assignee of the lessor notified the lessee, not only that he would be held for another year if he continued in possession beyond the demised term, but that the renewal would be at an increased rent. Selden, J., in sustaining a judgment for the plaintiff, said: "It is insisted that the referee was wrong in overruling the motion for a nonsuit, for the reason that no privity of contract between the parties was shown, but a privity of estate only. Had the defendant gone into possession as a trespasser, this position might be correct. But he was in as a sub-tenant under the Sherwood lease. The plaintiff, being the owner of the residue of the term created by that lease (as for the purposes of this

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question we must assume), gives notice of his rights to the defendant, and states the terms on which the expired lease of the latter may be renewed. Here is something more than a mere privity of estate, viz.: a direct proposition from the owner of the reversion to the tenant in possession for a renewal of his lease, and this proposition is met by a continued occupation without other reply. This, I think, laid the foundation for an implied contract. It was in law, a virtual assent to the terms prescribed in the notice. The referee was right, therefore, in overruling the motion for a nonsuit." Smith v. Maxfield, 9 Misc. Rep. 42, and Goldberg v. Mittler, 23 id. 117, holding that a landlord will not be permitted to claim a renewal lease where the premises have been leased to a third party, are inapplicable. They proceed upon the theory that, by leasing to a new tenant, the landlord manifests an intention not to hold his old tenant for a renewal period. But in this case Gerken was not defendant's landlord when the lease expired. By virtue of the statute the plaintiff occupied that relation. If the plaintiff had leased to a third party, then the cases cited would apply. All the causes of action are well pleaded within the authorities cited.

Demurrer overruled, with costs.

OSCAR B. BERGSTROM and HENRY A. TAYLOR, Doing Business under the Firm Name and Style of BERGSTROM & COMPANY, Plaintiffs, *v.* THE RIDGWAY-THAYER COMPANY, Defendant.

(Supreme Court, New York Special Term, February, 1907.)

Libel and slander — Pleading — Complaint — Colloquium — In suit by copartnership, allegation that article was published concerning the individual plaintiffs suffices.

A partnership unlike a corporation has no legal existence apart from the members composing it; and, in an action by the copartners for libel, it is sufficient to allege and prove that the article complained of was published concerning the individual plaintiffs.

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DEMURRER to complaint in action for libel.

Oscar B. Bergstrom, for plaintiffs.

Clarence J. Shearn, for defendant.

O'GORMAN, J. The action is for libel and the defendant demurs on the ground that the complaint does not state a cause of action. In the article complained of the plaintiffs, who are copartners, are referred to by their firm name. Counsel for the defendant argues "that while the action is brought for libel the allegations in the complaint not only negative any claim or inference that the article was published of or concerning the partnership, but distinctly set forth that the article was published concerning the individual plaintiffs." It is apparent that the counsel misconceives the partnership relation. A partnership, unlike a corporation, is not an entity. A firm, as such, is not regarded as having any legal existence apart from the members composing it. 22 Am. & Eng. Encyc. of Law, 75. When copartners are libeled under their firm name the wrong is done to the individuals composing the copartnership, and as individuals they are entitled to redress and may maintain a joint or several action. 18 Am. & Eng. Encyc. of Law, 1055. The objectionable article is actionable *per se*, and special damages need not be alleged. A publication is libelous *per se* when it has a tendency to injure a person in his business or occupation, or exposes him to public hatred, contempt, ridicule or disgrace. The writing complained of is capable of a construction making it actionable on both of the above grounds. By appropriate averment the complaint sets forth the defamatory matter, that the plaintiffs are copartners carrying on business under the firm name therein mentioned, and that the article was published of and concerning them. This latter allegation is not contradicted by the other averments of the complaint, and Corr v. Sun Printing & P. Co., 177 N. Y. 134, is, therefore, inapplicable. The cause of action is well pleaded and the demurrer is overruled, with costs.

Demurrer overruled, with costs.

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THE COMMERCIAL NATIONAL BANK OF CHICAGO, Plaintiff, v. CARL BROEDERMANN SLOMAN and ROBERT EDWARD LOESENER, Defendants.

(Supreme Court, New York Trial Term, February, 1907.)

Shipping — Liabilities of vessels and owners — Contracts of master for supplies.

Former adjudication — Causes of action barred or merged in general — Causes of action on indebtedness and on collateral security.

Where the captain of a vessel, for the purpose of paying ship brokers the expenses for port charges, supplies and services, drew to his own order and indorsed a note payable five days after the arrival of the vessel at the port of destination, and the brokers delivered the same to plaintiff who advanced the amount thereof which was applied to the payment of such expenses, the receipts for which were sent to the owners of the vessel; in an action thereafter brought against the owners to recover the moneys advanced by the plaintiffs, a judgment of the Commercial Court of Antwerp, in favor of the defendants, in an action upon the note, brought by plaintiffs against the captain of the vessel in his representative capacity and the defendants in the present action, upon the ground that the master had no authority to make the note, is not an adjudication upon the question of the defendants' liability in the present action.

MOTIONS to dismiss complaint and set aside verdict.

Wing, Putnam & Burlington, for motions.

Curtis, Mallet-Prevost & Colt, opposed.

SEABURY, J. The plaintiff in this action seeks to recover from the defendants the sum of $8,087.23. In November, 1902, the steamship Lugano, of which the defendants were the owners, was put on berth with Baccich & Clement, ship brokers at New Orleans. The steamship Lugano was a German vessel, sailing under the German flag, and while at New Orleans loading a cargo for Antwerp incurred certain expenses and disbursements for port charges, supplies and services. On the morning of November twenty-fourth, when the steamship Lugano was about to sail, Baccich & Clement

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presented to the master of the vessel a statement of account, stating the details and total amount of these expenses. All of these expenses at that time remained unpaid, except some small items that did not aggregate more than $205.43, which latter amount had been advanced by Baccich & Clement. To provide for the payment of the amount due, the captain of the Lugano drew to his own order and indorsed in blank a note, which provided that "five days after arrival (or upon collection of the freight if sooner made) of the German steamship Lugano under my command at the port of Antwerp, Belgium; or at any other which the voyage might terminate, I promise to pay to the order of myself the sum of sixteen hundred and seventy-three 10-2 pounds British sterling, in approved bankers' demand bills, on London for value received for necessary disbursements owed by my vessel at this port." After signing and indorsing the note in the manner indicated, it was delivered to Baccich & Clement. Baccich & Clement after receiving the note indorsed it payable to themselves, and on the same day delivered it to the representative of the Commercial National Bank of Chicago, the plaintiff in this action, from whom Baccich & Clement received $8,087.23. Out of this sum Baccich & Clement paid the expenses shown in the statement of account referred to, and their own compensation, and sent the receipts for these payments to the defendants. The plaintiff indorsed the note and sent it to the Banque Centrale of Antwerp for collection, and the Banque Centrale, pursuant to the plaintiff's authority, brought suit on the note in the Commercial Court of Antwerp. The suit was brought against the captain or master of the Lugano in his representative capacity, and the defendants in this action.

The Commercial Court of Antwerp was a court of competent jurisdiction in respect to the subject-matter of the action, and rendered judgment in favor of the defendants in that action. The judgment of the Commercial Court was founded on the fact that, under the German Commercial Maritime Code, a master of a German ship has no authority in his capacity as master to make a note or draft. See § 529 of the German Commercial Maritime Code, Arnold's Eng.

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trans. of the Code, at p. 14. These facts appearing without dispute upon the trial of this action, the court reserved decision upon the defendants' motion to dismiss the complaint, directed a verdict for the plaintiff for the amount claimed and reserved decision upon the motion of the defendant to set aside the verdict.

The question to be determined here is whether the judgment of the Commercial Court of Antwerp is *res adjudicata* in this action. In this connection it must be borne in mind that the present action is to recover the moneys which the defendants received through their agent from the plaintiff and is not based upon the master's note. The test by which this question is to be determined is whether the same evidence which could have been offered in support of the previous action would maintain this action. If so, then the former judgment is a bar to the prosecution of this action; if not, then no reason exists why the plaintiff should not have judgment upon its present complaint. That this is the principal test to be applied in determining this question was early asserted and has been consistently maintained. In Snider v. Croy, 2 Johns. 227, Kent, Ch. J., held that the test to know whether a verdict and judgment in a former action is a bar is whether the same evidence will support both actions. The courts of this State have repeatedly reasserted this rule. Stowell v. Chamberlain, 60 N. Y. 272; Belden v. State, 103 id. 1; Marsh v. Masterton, 101 id. 401. The same rule has also been declared in other jurisdictions (Rossman v. Tilleny, 80 Minn. 160; Geary v. Bangs, 138 Ill. 77; Buddress v. Schafer, 12 Wash. 310; Jones v. Fales, 4 Mass. 245, 255; Taylor v. Indiana Paper Co., 64 Ill. App. 339; Syndell v. Leggett, 1 Mo. 432), and by text-writers (2 Black Judg., §§ 723, 733; Freem. Judg., § 259).

The application of this test to the facts of the present action shows that the former judgment is not a bar. The cause of action sued upon here is not identical with the cause of action sued upon in the Belgium court, and the evidence which would support a recovery in an action for money had and received would not support an action on the note.

Although it appears that under the German law, to which

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the Belgium court gave effect, the master was not authorized to give the note in question, it does not necessarily follow that he was without power to borrow money at New Orleans as the agent of the defendants. Under the facts and circumstances shown to have existed in this case, the master had authority to bind his principals for the money the plaintiff advanced. The Wyandotte, 136 Fed. Rep. 470; affd., 145 id. 321; McCready v. Thorn, 51 N. Y. 454; Chase v. McLean, 130 id. 529. In contracting the debts for the present and future necessary supplies of the ship and in borrowing the money to pay the debts that had been incurred and which must have been paid to enable his ship to clear the port of New Orleans, the master was acting within the scope of his authority. The plaintiff having advanced the money to the agent of the defendants, and the defendants having received the benefit of it, the plaintiff may recover the money notwithstanding the fact that the defendants' agent gave the plaintiff a void note as a means of payment for such advances. By receiving the void note the plaintiff did not forfeit its right to recover upon the original debt and its delivery did not impair the defendants' obligation to pay the debt which they had contracted. It is true that the means or method by which the defendants' agent attempted to pay the debt was declared by the Belgium court to be illegal, but the original obligation was lawful. In Hoag v. Town of Greenwich, 133 N. Y. 152, the court, considering the case of a town sued for money borrowed for which it had illegally issued bonds, said: "We may concede that for such reason the four bonds were void as bonds, as vouchers or securities; but it does not at all follow that the loan was void, that the borrowing was unlawful, that the lender lost his money and the town was at liberty to perpetrate a disgraceful robbery by means of the fault or mistake of its own agents. Treating the four bonds as void, we are required to dismiss them from the transaction, but not to repudiate the transaction itself. They were unlawful incidents of a perfectly lawful transaction and may be disregarded while the transaction stands." Louisiana v. Wood, 102 U. S. 294; Bangor Sav. Bank v. City of Stillwater, 49 Fed. Rep. 721.

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The money advanced inured to the benefit of the defendants and there is no principle of justice which they can invoke which will justify them in withholding payment from the plaintiff who advanced the money to them. The motions to dismiss the complaint and set aside the verdict are denied.

Motions denied.

MICHAEL CASEY, Plaintiff, *v.* THE CONNORS BROTHERS CONSTRUCTION COMPANY and THE UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, Defendants.

(Supreme Court, Onondaga Special Term, February, 1907.)

Mechanics' liens — Bond or deposit to avoid lien — Fixing liability of sureties — No lien, no liability.

Upon an undertaking given to discharge a mechanic's lien under the provisions of section 20 of the Lien Law (L. 1897, ch. 418) and conditioned for the payment of "any judgment which may be recovered in an action to enforce the lien," the sureties are not liable unless the judgment establishes the validity of the lien.

DEMURRER by the defendant, The United States Fidelity and Guaranty Company, on the ground that the complaint does not state facts sufficient to constitute a cause of action.

Curtin & Lee, for plaintiff.

L. N. Southworth, for defendant demurring.

ANDREWS, J. The complaint clearly does not state facts sufficient to sustain an action for the foreclosure of a lien, or to establish its validity. It shows that the claim of the plaintiff is based upon work done for the construction of a public improvement, and that the notice was not properly filed. Yet as against the Connors Brothers Construction Company, the original contractor, the plaintiff may recover judgment for such sums as may be due him. Terwilliger v. Wheeler, 81 App. Div. 460.

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The notice in question was filed with the county clerk. Thereupon The United States Fidelity and Guaranty Company, as surety, for the purpose of discharging such lien, executed an undertaking, conditioned for the payment of "any judgment which may be recovered in an action to enforce the lien."

Concededly, in cases not involving public improvements, where a lien is discharged upon an undertaking conditioned, as the statute provides, "for the payment of any judgment which may be rendered against the property for the enforcement of the lien," if the lien is not established, no recovery may be had against the surety. Lien Law, § 18.

The language of section 20 is not the same, but it differs only in so far as circumstances compel a variation. In the case of public improvements, no judgment against the property is obtained. The lien is enforced by recourse solely to the fund which may be due from the municipal corporation. So in the latter case the lienor is to be assured the payment of a judgment recovered, not against the property, for that is impossible, but in an action to enforce the lien.

But the judgment must be in such an action. This is the undertaking. It is not that the lienor shall be paid whatever he may recover in an action on contract, but what he may recover in an action to enforce the lien.

If the complaint does not state the requisite facts to enable the plaintiff to foreclose his lien, or to establish it, it is not an action to enforce a lien. Whatever the complaint may state, if the plaintiff fails to prove the requisite facts, it is not a judgment in such an action, although section 3412 may allow a money judgment to be obtained. A judgment "in an action to enforce a lien" does not mean a judgment that no lien exists, but that the plaintiff is entitled to a money judgment because of breach of contract on the part of some defendant. It means a judgment that a valid lien exists.

None of the cases cited by the plaintiff conflict with this view. They all, as for example, McDonald v. Mayor, 113 App. Div. 625, arose under a statute applicable to New York city, where the condition of the undertaking was that the surety "should pay any judgment recovered in an action

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upon the claim or demand specified in said notice of lien."

There is one case, however, squarely in conflict with the views above expressed. It is Hawkins v. Mapes-Reeve Construction Co., 82 App. Div. 72. In an action against the contractor on a public improvement and his surety it was held that the lien was void. Still judgment could be recovered against the contractor. The surety had inadvertently given an undertaking in the form mentioned in the last paragraph, although the present Lien Law had been in force for some months. The court said that this bond should be construed as a substantial compliance with the Lien Law as it existed at the time. "There is no material difference between the phraseology of this bond * * * and the undertaking required by the Lien Law * * * The one was an absolute condition to pay any judgment recovered in an action upon the claim or demand specified in the notice of lien against the contractor, and the other to pay any judgment recovered against the contractor in an action to enforce the lien; but since section 3412 of the Code at the time of the last enactment permitted the recovery of a personal judgment against the contractor in an action to enforce the lien, even though the lien be invalid, the bond must be deemed to have been made with reference to such a recovery."

Two of the five justices dissented, and an appeal was taken to the Court of Appeals. It is there reported in 178 New York, 236. The judgment below was affirmed, but on the ground that the lien was a valid one; and the court expressly refused to determine that the Appellate Division was correct with regard to the effect of the Code.

The question seems to be, therefore, still an open one. This being so, I am of the opinion that a lienor may not recover of one who has become a surety under section 20 of the Lien Law, unless he both alleges and proves that the lien discharged by virtue of the undertaking was a valid lien. It follows that the demurrer herein must be sustained.

An order to that effect may be entered, such order to be settled before me on proper notice.

Demurrer sustained.

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THOMAS F. SCANLON Plaintiff, *v.* SOLOMON WALLACH, Defendant.

(Supreme Court, New York Trial Term, February, 1907.)

Negotiable instruments: Notice of dishonor — Necessity — Where drawer of check stops payment; Bona fide holders — What constitutes — Parting with value.

Pleading — Amendments — By leave of court — Amendments to conform to proof.

In an action upon a bank check it is not necessary that the complaint should state that notice of the dishonor of the check was given to the drawer in a case where the drawer stopped payment of the check, but it should contain an allegation that payment was stopped.

Where no such allegation was contained in the complaint, but the fact that the drawer stopped payment was proved, without objection, the complaint should be made to conform to the proof.

Where one holding a mortgage upon property taken by a municipality for a public use declines to satisfy it upon payment of a sum less than the amount due thereon, but finally, at the request of one of the parties interested in the award, in order to prevent delay in its payment, consents to do so, upon receiving his check for the deficiency, the execution and delivery of such satisfaction is a sufficient consideration for the check.

ACTION to recover upon a check. Tried before the court without a jury.

Smith & Simpson, for plaintiff.

Goldfogle, Cohn & Lind, for defendant.

SEABURY, J. The plaintiff brings this action to recover upon a check made and delivered by the defendant to Mary L. Breese, guardian of William L. Breese, and by her transferred to the plaintiff. The check was given as a result of the following circumstances: The defendant's wife died intestate, seized of real property in New York city, and leaving her surviving her husband and several children. The property was taken under condemnation proceedings by the city of New York. The plaintiff's assignor held a mortgage

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upon this property. A proceeding was instituted in the Supreme Court to determine to whom and in what proportions the award which the city made upon taking the property should be paid, and resulted in an order dated November 14, 1904, fixing the interest of the defendant, as tenant by curtesy, and the interest of the children in the property, and directed that the comptroller pay the plaintiff's assignor $26,685.39, "upon her executing to the said comptroller a satisfaction and discharge of the mortgage held by her against the premises, No. 37 Willett street." On December 9, 1904, the parties in interest met in the office of the comptroller of the city of New York, who offered to the plaintiff's assignor the principal of her mortgage and interest up to September 22, 1904, provided she would sign and deliver a satisfaction of the mortgage and deliver the mortgage and bond. The plaintiff's assignor refused to comply with the conditions prescribed and demanded interest on the mortgage debt for the period intervening between September 22, 1904, and December 9, 1904, at the rate prescribed in the mortgage. To induce the plaintiff's assignor to sign and deliver the satisfaction of mortgage and to deliver the bond and mortgage which she held, and thereby facilitate the closing of the transaction, so that he might receive his own share of the award without further delay, the defendant delivered the check which is the subject of this action. The plaintiff's assignor thereupon delivered the bond and mortgage and signed and delivered the satisfaction of mortgage to the comptroller, and the award was paid to the parties entitled to receive it. The defendant then stopped payment upon the check.

The defendant urges two objections to the plaintiff's claim in this action. *First,* that the complaint does not state facts sufficient to constitute a cause of action in that it fails to allege that notice of the dishonor of the check was given to the drawer. The complaint is undoubtedly defective in this respect. Neg. Inst. Law, §§ 160, 185; Harker v. Anderson, 21 Wend. 372; Goodwin v. Cobe, 24 Misc. Rep. 389. The facts disclosed upon the trial showed that the drawer of the check stopped payment upon it, and section 185 of the

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Negotiable Instruments Law provides that notice of dishonor is not required to be given to the drawer when the drawer has countermanded payment. Under these circumstances the complaint should be amended so as to conform to the proof. The defendant can in no way be prejudiced by permitting the plaintiff to amend his complaint so as to allege that the drawer of the check countermanded payment.

Second. The defendant contends that the check was without consideration. Even though the title to the premises in question vested in the city of New York on July 3, 1901 (Greater N. Y. charter, § 1439; Hill v. Wine, 35 App. Div. 520), and notwithstanding the fact that the defendant was not indebted to the plaintiff, the signing and delivery of the satisfaction of the mortgage, and the surrender of the bond and mortgage by the plaintiff's assignor, was a sufficient consideration to sustain the validity of the check. The learned counsel for the defendant contends that the signing and delivery of the satisfaction of the mortgage and the surrender of the bond and mortgage "was no valid consideration, for it had no value," but this contention is completely answered when the definition of what constitutes consideration is appreciated. Pollock, in his work on Contracts, after quoting the familiar definition formulated by the Exchequer Chamber, in Currie v. Misa, 10 Exch. 153, 162; affd., 1 App. Cases, 554, says: "Consideration means not so much that one party is profited as that the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first. It does not matter whether the party accepting the consideration has any apparent benefit thereby or not; it is enough that he accepts it and that the party giving it does hereby undertake some burden or lose something which in contemplation of law may be of value." Wald's Pollock Cont., p. 167. The application of this elementary principle is obvious, and it is unnecessary to multiply the citation of authorities. The plaintiff's assignor had a legal right either to sue the city of New York for the interest that was due to her upon the date of the award or to bring an action upon the bond. In Hill v. Wine, *supra,* Mr. Justice Ingraham said: "The interest

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of both the mortgagor and the mortgagee in the mortgaged premises were acquired by the city for public use, and in place of that interest in the land, the plaintiff had the right to require the city of New York to pay the value of her interest directly to her. The plaintiff's right of action against the obligor upon the bond was not affected, and, if the award by the city was not sufficient to pay the mortgage, the mortgagees would have a cause of action against the plaintiff upon the bond, but the lien upon the mortgaged premises having vested in the city, there was no lien or mortgage that the plaintiff could foreclose." The abandonment by the plaintiff's assignor of her right of action against the city, or of her right to bring an action upon the bond, and the signing and delivery of the release were ample consideration to sustain the validity of the check.

Judgment for the plaintiff for the amount claimed, with interest and costs.

Judgment for plaintiff, with interest and costs.

THE GANSEVOORT BANK OF THE CITY OF NEW YORK, Plaintiff, *v.* WALTER C. GILDAY, Defendant.

(City Court of New York, Trial Term, February, 1907.)

Negotiable instruments: Accommodation paper — Liability to one who has not parted with value; Bona fide holders — What constitutes a bona fide holder — Parting with value.

Where a note is given for a preceding note of the same amount made by the same parties and the original note is not surrendered or canceled, the holder has not parted with value and cannot recover thereon against an accommodation maker.

TRIAL before court without a jury. The opinion states the facts.

Philip J. Britt, for plaintiff.

Edward Hassett, for defendant.

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DELEHANTY, J. This action is brought for the recovery of $510.17, together with interest, on defendant's note, dated October 25, 1904, to the order of plaintiff and payable six months after date. Defendant admits the making of the note and also that no part of same has been paid, but sets up as a defense thereto that he never received any value therefor and that plaintiff is not the holder thereof in due course for value. Upon the trial, before the court without a jury, defendant testified that he made the note in question and delivered it to one Dresser for the latter's accommodation, and that he knew when he did so that he was liable thereon. In this connection the testimony of plaintiff's cashier stands undisputed that Dresser brought the note to plaintiff before maturity and that at his (Dresser's) request the same was discounted and the avails thereof were placed to the credit of the Howley-Dresser Company. This testimony, standing alone, would, under the provisions of section 55 of the Negotiable Instruments Law make the plaintiff a holder of the note for value and the defendant liable to it thereon. But there is other evidence in the case submitted on behalf of plaintiff to the effect that it took the note in suit in payment of a previous note, which latter had been given to pay or take up a note previous to that one. Both these notes are of accommodation nature and are still retained by plaintiff. It is on account of this retention that defendant claims that the plaintiff is not a holder for value of the note in suit. If that be so, then it is not a holder in due course and is precluded from enforcing payment of the obligation in question. See Neg. Inst. Law, §§ 91, 96. While by section 51 of the law cited an antecedent or pre-existing debt constitutes a valuable consideration in support of a promissory note, yet to have that consideration effective it seems there must have been a cancellation and in legal effect a payment and discharge of the antecedent or pre-existing obligation. Otherwise where is there a parting of value for the new one? When plaintiff discounted the first note concededly it parted with value. The taking of the second and third notes, the latter the one in suit, under the circumstances detailed operated simply as an extension of the time of payment of

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the original note, and when it failed to cancel and discharge the first and second notes its duty on nonpayment of the last one was to sue on the original obligation and to have pleaded the giving of the subsequent notes, which would be surrendered to defendant upon the trial. Muldoon v. Whitlock, 1 Cow. 290; Jagger Iron Co. v. Walker, 76 N. Y. 521. I am forced to the conclusion that there was no consideration for the note in suit, otherwise there would have been a cancellation of the note for which it was given. If plaintiff is entitled to recover at all it must be upon the first note. Sutherland v. Mead, 80 App. Div. 103. If right in my conclusions it follows that there must be judgment for defendant dismissing the complaint upon the merits.

Complaint dismissed upon the merits.

IRVING I. KEMPNER et al., Plaintiffs, *v.* CACALIE BAUER, J. BURNET NASH, as Trustee in Bankruptcy, Impleaded with Others, Defendants.

(Supreme Court, New York Special Term, February, 1907.)

Bankruptcy — What passes to the assignee and the nature of his title — Effect of discharge of trustee.

By the adjudication in bankruptcy and the appointment of the trustee a bankrupt is divested of all title to his property, and the trustee's discharge does not restore title to the bankrupt or his heirs.

ACTION for partition.

Kurzman & Frankenheimer, for plaintiffs.

Carrington G. Arnold, for defendant Nash, trustee.

O'GORMAN, J. It is clear that the interest of the bankrupt in the realty in question belongs in equity to the creditors. By the adjudication in bankruptcy and the appointment of the trustee the bankrupt was divested of all title to

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his property (Rand v. Iowa Central R. Co., 186 N. Y. 58), and nothing has occurred by which the title has been restored to the bankrupt or his heirs. The discharge of the trustee should not preclude an application to open the discharge and reinstate the original trustee or appoint a successor. Let the interlocutory judgment provide that one-third of the net proceeds be deposited in the office of the chamberlain of the city of New York, subject to the further order of the court. After the sale and the ascertainment of the amount distributable, the trustee in bankruptcy may make such application as he may be advised in the premises.

Ordered accordingly.

SOLOMON TURCK, Plaintiff, *v.* STEWART H. CHISHOLM et al., Defendants.

(Supreme Court, New York Special Term.)

Discovery — Examination of party before trial — Right to remedy — Matters not preventing.

It is not a sufficient ground for vacating an order to examine an adverse party before trial that such party is a resident of the county and intends to be present at the trial, nor that the applicant can procure the required information from other persons; nor is a denial by the party sought to be examined of knowledge of the facts a sufficient ground.

ACTION for damages. Motions to vacate an order made for the examination before trial of two of the defendants, former directors of the company.

Meighan & Necarsulmer (S. Untermeyer, John A. Garver and Henry Necarsulmer, of counsel), for plaintiff.

Howland, Murray & Prentice (George W. Murray, of counsel), for D. O. Mills.

Harry R. Kohn, for M. J. O'Shaughnessy.

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LEVENTRITT, J. This action was brought to recover damages sustained by the plaintiff in the purchase by him of stock of the American Grass Twine Company, which purchase was induced by certain false representations alleged to have been made by the defendants. An order made for the examination before trial of two of the defendants, former directors of the company, is now sought to be vacated on many grounds. The alleged false representations were: 1. That the entire capital stock of $15,000,000 was issued as fully paid, when in reality it was issued for property worth less than $250,000. 2. The announcement that four quarterly dividends during the year 1902 were paid out of profits, when as a fact they were paid out of capital. 3. Issuing to stockholders and causing to be published statements to the effect that the company had earned and was earning net profits exceeding the amount of those dividends. 4. Inflating on the books of the company the valuation of its plants and assets for the purpose of creating an apparent surplus. After detailing the facts required by section 872 of the Code, the plaintiff, in his affidavit, in compliance with Rule 82 of the General Rules of Practice, states that the examination is material and necessary in that he expects thereby to prove: (1) The fact that the defendants issued to themselves as fully paid the $15,000,000 of stock for property which they knew to be worth less than $250,000; (2) the discussions had at meetings of the board of directors in January, 1902, at which the valuation of the plants and other assets was increased so as to show the apparent surplus; (3) the proceedings and discussions which led to the declaration of the four quarterly dividends; (4) the statements made under the direction of the defendants to the Stock Exchange in order to obtain the listing of the stock; and (5) facts affecting the value of the stock within the knowledge of the defendants when they declared the dividends. The contention first raised as a ground for vacating the order, that the defendants are residents of this county, are amenable to service of process and intend to be present at the trial, is untenable. The right given by the Code is absolute and may be exercised at any time before or during

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the trial. It is not an answer to say that a party may be subpœnaed or even that he stipulates to be present at the trial. Commercial Pub. Co. v. Beckwith, 57 App. Div. 574. The object of the statute is to enable a party to obtain the testimony of his adversary before trial, so that it may be used on the trial. The information desired by the plaintiff, and which will be necessary to the establishment of his cause of action, is to be deduced from many proceedings and events which are, to some extent at least, within the knowledge of the defendants, and the precise nature of which must be searched out and determined to enable the plaintiff to properly present his case. Were he, on his adversary's stipulation to attend, remitted to the time of the trial to elicit and piece together the information required, not only would he be deprived of the beneficial results contemplated by the statute, but he might by reason of the defendants' nonattendance be seriously prejudiced. The examination cannot be resisted on the ground that the plaintiff can procure the required evidence from other persons. McKeand v. Locke, 100 N. Y. Supp. 704. The statute authorizes a party to examine his opponent where his testimony will tend to prove a necessary fact, and he is not required to show that the fact cannot be proved by other witnesses. "Where an issue of fact is presented to be determined upon the trial of the action, and where it appears that a party to the action has knowledge of facts which are material in the determination of that issue, either party to the action under these provisions of the Code is entitled to examine such a party and have his deposition taken for use at the trial." Goldmark v. U. S. Electro-Galvanizing Co., 111 App. Div. 526, 529. Denial of knowledge cannot assist the defendants. If they have no knowledge of the matters embraced in the order for their examination, they have only to assert their ignorance on the hearing; if they have such knowledge the plaintiff is entitled to it. If this were not the meaning of the statute a mere denial of knowledge would defeat its operation. Further, the mere allegation of the defendants, that the plaintiff is as fully acquainted with the facts as they, cannot defeat the examination in the face of the plaintiff's assertion to

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the contrary, especially when such assertion is supported by the surrounding circumstances and the significant fact that the plaintiff's connection with the corporation began long after the occurrence of the alleged fraudulent acts. There is no force to the objection that the plaintiff, as an officer of the company at one time, had access to the books. Thomas v. Waite Co., 113 App. Div. 494. But disregarding the broad effect given to the statute, and assuming that the plaintiff availed himself of that opportunity, it cannot be seriously contended that the information necessary to establish certain of the false representations could be derived from the entries in the books. The authorities called to my attention by the defendants and which emphasized the importance of technical rules have been superseded by recent decisions facilitating instead of obstructing the examination of one's adversary before trial. McKeand v. Locke, *supra;* Goldmark v. U. S. Electro-Galvanizing Co., *supra.* In the latter case the court, by Ingraham, J., says: "Where there is no doubt of the good faith of a party to a litigation seeking to establish a fact essential to his cause of action by the testimony of his opponent, I can see no reason why a party is not entitled to have the knowledge of his opponent as to the fact which he wishes to establish put upon record so that the evidence of that fact would be available to either party to the action when the trial takes place. It is not the duty of a court of justice to suppress the facts or throw obstacles in the way of either party in establishing the truth." The defendants' charges of bad faith on the part of the plaintiff are mere conclusions, which are not only unsupported by any evidence but are negatived by the facts disclosed. The motions to vacate must be denied, with ten dollars costs to plaintiff on each motion.

Motions denied, with ten dollars costs to plaintiff on each motion.

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JEREMIAH KEYSER et al., Plaintiffs, *v.* AUGUST MEAD et al., Defendants.

(Supreme Court, New York Special Term, February, 1907.)

Conversion (Equitable) — How and in what cases effected — By testamentary direction to sell realty — Direction not imperative.

Suspension of power of alienation — Validity of particular future estates — Where executor has power of alienation.

A power of sale contained in a will though not conferred in imperative terms, where its exercise is necessary to accomplish the testator's purpose and intention in the disposition of his estate, works an equitable conversion of his lands.

The Statute of Perpetuities is pointed only to the suspension of the power of alienation and not at all to the time of its exercise; and no suspension of the power of alienation arises merely from the possible non-action of executors to whom a power of sale is given.

In the case of a trust for sale and distribution without restriction as to time where the trustees are empowered to receive the rents and profits pending the sale for the benefit of beneficiaries, the fact that the interest of the beneficiaries is inalienable by statute during the existence of the trust does not constitute a suspension of the power of alienation.

ACTION for partition. Demurrer to complaint.

Perkins & Butler, for plaintiffs.

Miller, Miller & Storm, for defendants.

MACLEAN, J. The plaintiffs plead for the partition of certain premises, apparently under section 1537 of the Code of Civil Procedure, and are met with a demurrer on the ground of an insufficient statement of facts. The demurrer must be overruled, if the following apparent devise in the will of Ann K. Fisher, deceased, whose heirs-at-law the plaintiffs allege themselves to be, is void: "I hereby empower my executors hereafter appointed to take charge of my estate, collect rents, interest and income, and to sell my real and personal estate * * * at such time as they

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shall deem best at private sale or public auction, and make all necessary deeds and instruments in writing for the conveyance thereof, and the proceeds from such sales, rents and interest, after all expenses for the care and protection, repairs, taxes, interest and all necessary expenses for the settlement of my estate is paid, the balance remaining to be divided into twenty-five equal parts or shares and be distributed as follows and to the persons named hereafter, if living at the time of such distribution or division; if any hereafter named is dead their share or shares remain in the estate and go to increase the shares of the living at that time." There is no express devise of the real estate to the executors, nor is one to be inferred, for "an intent to create an express trust will not be presumed in the absence of an express declaration to that effect when the whole purpose * * * can be accomplished under a power" (Heermans v. Robertson, 64 N. Y. 332, 343), more particularly as the provision for the accumulation of rents is, if the clause in question be determined to be an express trust, in contravention of the provisions for the accumulation of rents as set forth in section 51 of the Real Property Law, the complaint alleging that all parties herein are of full age. The real estate, therefore, descended to the heirs of the testatrix; for, "Where a trust is valid as a power, the real property to which the trust relates shall remain in or descend to the persons otherwise entitled, subject to the execution of the trust as a power." Real Property Law, § 79. "Where by a will a bare power of sale is given to executors, and the lands meanwhile descend to the heir, the latter is at law entitled to the intermediate rents and profits, but if the power of sale operates as an immediate conversion of the land into personalty, accompanied with a gift of the proceeds, then in equity the intermediate rents and profits go with, and are deemed to be a part of, the converted fund, and the heir may be compelled to account therefor to the executor." Lent v. Howard, 89 N. Y. 169, 176. Herein the executors are empowered to sell the real estate at such time as they shall deem best, and to this power the real estate is subject, a power, it may be, not

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in terms imperative, nevertheless effective in working *ipso facto* an equitable conversion of the land. "It is true that the power of sale is not in terms imperative. The words are those conferring authority, and not words of command or absolute direction. But it is clear that a conversion was necessary to accomplish the purpose and intention of the testator in the disposition of the proceeds, and when the general scheme of the will requires a conversion, the power of sale operates as a conversion, although not in terms imperative." Lent v. Howard, *supra,* 177. True it is, "It is not lawful to create a perpetuity by means of a power in trust any more than by a direct limitation" (Booth v. Baptist Church, 126 N. Y. 215, 239); but it may not well be contended that under this power there is an unlawful suspension because the trustees may never sell, for herein the power itself of necessity operated as an immediate conversion, and there were and are persons, the two executors, in being by whom an absolute estate can be conveyed, but more especially because the question of suspension is herein confined to the equitably converted fund, wherein appears no illegal limitation of interests. "Where the trustee is empowered to sell the land, without restriction as to time, the power of alienation is not suspended, although the alienation in fact may be postponed, by the nonaction of the trustee, or, in consequence of a discretion reposed in him, by the creator of the trust. The Statute of Perpetuities is pointed only to the suspension of the power of alienation, and not at all to the time of its actual exercise, and when a trust for sale and distribution is made, without restriction as to time, and the trustees are empowered to receive the rents and profits, pending the sale for the benefit of beneficiaries, the fact that the interest of the beneficiaries is inalienable by statute, during the existence of the trust, does not suspend the power of alienation, for the reason, that the trustees are persons in being, who can, at any time, convey an absolute fee in possession. The only question which, in such a case, can arise under the Statute of Perpetuities, is whether the trusts in respect to the converted fund, are legal or operate to suspend the absolute ownership of the fund, beyond the period

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allowed by law." Robert v. Corning, 89 N. Y. 225, 235. Without construing the will in question, but merely determining that the apparent devise therein, at least as a power, is valid, the demurrer will be sustained, with costs.

Demurrer sustained, with costs.

FANNY MESSENGER, Plaintiff, *v.* ANNA CHAMBERS, Defendant.

(Supreme Court, Kings Special Term, February, 1907.)

Specific performance — Actions — Retention for award of damages.

In an action by the vendee for the specific performance of a contract for the sale of real estate, where it is alleged in the complaint that the defendant is unable to convey to the plaintiff a good and marketable title to the premises free from all incumbrances except those mentioned in the contract, the complaint will not be dismissed; but the cause will be stricken from the equity calendar and transferred to the calendar for the trial of issues by a jury.

MOTION to dismiss the complaint, in an action for the specific performance of a contract for the sale of real property, on the ground that it appears from the complaint that the plaintiff is not entitled to equitable relief.

Hyman Cohen, for plaintiff.

Bernard Chambers, for defendant.

BURR, J. The complaint alleges the making of a contract between the defendant, as the vendor, and the plaintiff, as the vendee, for the sale of real property in the borough of Brooklyn. This contract was to be closed on the 2d day of March, 1906. The complaint further alleges ability and willingness to perform on the part of the plaintiff, the vendee, and "that the defendant refused and was unable to convey to the plaintiff a good and marketable title to the said premises, free from all incumbrances, and was unable to give to the plaintiff a deed sufficient for the purchaser to have the said premises free from all incumbrances,

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except those mentioned in the contract of sale." The complaint then alleges the payment of $200 earnest money, at the time of the execution of the contract, the incurring of an indebtedness of $100 for counsel fees in the examination of the title, and damages to the extent of $1,000 for loss of the bargain. The complaint then prays for the specific performance of the contract by the defendant, or, in the alternative, for damages for the breach thereof.

The case came on for trial on the equity side of the court; and, at the commencement of the trial, a motion was made by the defendant to dismiss the complaint on the ground that it affirmatively appeared that the plaintiff was not entitled to equitable relief, but only to an action at law for damages.

The general doctrine is well established (and from the very nature of the case it could not be otherwise), that the absolute inability of the defendant to perform his undertaking, when called upon by the court to do so, prevents a decree against him for its specific performance. Pom. Cont., Sp. Pref. (2d ed.), § 293; Kennedy v. Hazleton, 128 U. S. 667.

In the latter case, the court say: "A court of chancery cannot decree specific performance of an agreement to convey property * * * to which the defendant has no title * * * and if it appears by the bill * * * that the want of title (even if caused by the defendant's own act, as by his conveyance to a *bona fide* purchaser), was known to the plaintiff at the time of beginning the suit, the bill will not be retained for assessment of damages, but must be dismissed and the plaintiff left to his remedy at law."

There is some conflict of authority as to whether the bill must allege ability to perform (Broder v. Gordon, 50 Misc. Rep. 282), or whether inability to perform is not a defense. Borden v. Curtis, 46 N. J. Eq. 468, 471. But all the authorities agree that, if the bill for specific performance alleges affirmatively inability to perform and no other ground of equitable jurisdiction is set forth, the bill will be dismissed in the equity court. Story's Eq. Pl., § 34;

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Kennedy v. Hazleton, *supra;* Hatch v. Cobb, 4 Johns. Ch. 559; Kempshall v. Stone, 5 id. 193.

The rule with regard to retaining a bill where, on the face of the pleadings, the equity court has jurisdiction, for the purpose of administering legal relief, provided that it appears upon the trial that equitable relief cannot be granted, has been established in some jurisdictions by statute and in some by judicial determination. In England, by act of Parliament, adopted in 1853 (21, 22 Vict., ch. 27, § 1), it was provided that "In all cases in which the Court of Chancery has jurisdiction to entertain an application for the specific performance of any contract, it shall be lawful for the same court to award damages to the party injured either in addition to or in substitution for such specific performance." In interpreting this statute, the English courts have settled the doctrine that it does not enlarge the jurisdiction of equity by extending its power to grant relief over any case which did not previously fall within its scope. In other words, where the plaintiff fails to establish any contract of which specific performance can be decreed, a court of equity has no power under the statute to grant the relief of damages. Pom. Cont., Sp. Perf., § 470; Lewers v. Earl of Shaftesbury, L. R., 2 Eq. 270; Scott v. Rayment, 7 id. 112.

The courts in this State, in the absence of any statutory provision, have held that, when *by the language of the bill* an equity court had gained jurisdiction, it may retain it for the purpose of assessing damages, provided it developes upon the trial that the equitable relief prayed for cannot be decreed. Miller v. Edison El. Ill. Co., 184 N. Y. 17, 21.

Although the principle last above stated appears in the dissenting opinion of Mr. Justice Gray, that position was concurred in by all the members of the court. The same principle is asserted in many other cases. Haffey v. Lynch, 143 N. Y. 241; Sternberger v. McGovern, 56 id. 12; Margraf v. Muir, 57 id. 155. But, in each of these cases, the court was careful to say that the complaint must state facts giving an equitable cause of action, and also a legal cause of action arising out of the same transaction. Sternberger v. McGovern, *supra.*

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The distinction between a case which states an equitable cause of action in the complaint, but fails to establish its right to equitable relief on the trial, and one where it omits to do so, is well pointed out in Mowbray v. Levy, 85 App. Div. 68. In that case the court say: "The equity court will not steal its jurisdiction from the law side of the court, but when it fairly belongs there (that is, in the equity court), it may retain it in order to do justice, even though it is necessary to give a personal judgment."

When the motion was made at the trial to dismiss the complaint for the reason that a court of equity on the face of the complaint had no jurisdiction to try the same, I was inclined to believe that the motion should be granted. That was the universal practice before the adoption of the Code authorizing the uniting in the complaint of causes of action, both legal and equitable, arising out of the same transaction. Sternberger v. McGovern, *supra,* 20.

Now, however, the rule seems to be established that, instead of dismissing the complaint, an order will be made striking the case from the equity calendar and transferring it to the calendar for the trial of issues by a jury. Gilbert v. Bunnell, 92 App. Div. 284.

Nothing has appeared in this case to call in question the good faith of the plaintiff in this action, but a practice has arisen, within the last few years in this department, which should be severely condemned. In cases where a contract for the sale of real estate has been entered into, if, at the time that the contract is to be completed the vendee is not ready to perform, some objection is taken to the title of the vendor and a tender is refused. The vendee then immediately begins an action for specific performance, alleging inability of the vendor to perform, and files notice of pendency of such action. Under such circumstances, in many instances, the vendor, being unable to dispose of his property by reason of the notice of *lis pendens,* has either made concessions to the vendee to induce him to take the title, or the vendee has obtained considerable additional time within which to carry out his contract. If, on a complaint alleging inability of the vendor to perform, the equity

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court declines to entertain an action by the vendee for specific performance and cancels the notice of *lis pendens*, this practice will be stopped. Krainer v. Coffey, N. Y. L. J., Jan. 18, 1907. The unwarranted filing of a notice of pendency of action is a grievous wrong. If actions for malicious prosecution were brought under such circumstances against the person abusing the process of the court, it would tend to check the evil.

This case will be stricken from the calendar of the Special Term of this court and sent to the calendar for the trial of issues by a jury, to take its place on such calendar according to the date of issue and to be moved for trial under the rules of this court.

Ordered accordingly.

JOHN D. FOUQUET, Plaintiff, *v.* THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Defendant.

(Supreme Court, Dutchess Trial Term, February, 1907.)

Master and servant — Master's liability for injuries to servant — Fellow servants — Difference in character of work — Draftsman and elevator man.

Negligence — Actions — Evidence — Presumptions and burden of proof — Presumption of negligence from happening of accident.

Where plaintiff, a draftsman employed by a railroad company in its surveying and engineering department, is injured while stepping off the elevator in a building occupied by it and another railroad company for depot and office purposes, the elevator being used by the employees of both companies and the general public; and where there is no evidence as to the circumstances attending the injury other than that the door on the landing closed partly to, striking plaintiff as he was stepping from the elevator, and that the elevator began to descend, throwing him to the floor and causing the injuries complained of; and where there is nothing to indicate or suggest that the movement of the door and the descent of the elevator might not have been due to the negligent act of the elevator man, and there is no fact or circumstance shown wherefrom the negligence of the master may be inferred, or to justify an inference that the elevator or the machinery and apparatus used

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in its operation were defective or out of repair, the plaintiff may not recover against his employer.

In such case the rule as to the master's non-liability to an employee for the negligence of a co-servant applies; and the maxim *res ipsa loquitur* does not apply.

MOTION to dismiss complaint at close of case, the decision of which was reserved until after the jury returned their verdict.

H. W. Alden, for plaintiff.

John C. Robinson, for defendant.

MADDOX, J. It is a matter of common knowledge that employees in the administrative offices and departments of a railroad corporation are as necessary to the general purposes of the company as are those in the departments having solely to do with the detail of the actual physical maintenance and operation of the railroad and its train service, its work of construction and repair.

Here plaintiff and the elevator operator were employed by a common master, the defendant, in its terminal depot and office building in New York city; the former in its surveying and engineering department and the latter in that having to do with the control, management and care of such building, both branches of defendant's service being administrative in character. The building was devoted to depot and office purposes, was occupied by the defendant and the New York, New Haven & Hartford Railroad Company, in part as a depot and the balance for executive and administrative offices of the two companies; and the elevator, in the operation of which plaintiff suffered injury, was used by the employees and the general public in going to and from the offices of the two companies.

In maintaining said building for its offices and terminal depot, the defendant was providing for the performance of some of the detail in its general purpose and enterprise, the operation of its railroad, a building in which were the offices for the transaction of its executive, administrative and operative affairs and business; and we must recognize that

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the affairs and business of such departments are without question very closely allied and interwoven.

An elevator is now considered an essential in an office building, indeed, in any high structure; and defendant, in providing elevator service, was but facilitating and expediting its business in making the various offices in the building easy of access to those of the general public having business in any of its offices as well as to the employees therein employed, all of which have more or less directly to do with its general purpose, its railroad business.

The fact that the defendant leased, or suffered to be used, any part of the building by the New Haven railroad company for office purposes is of no moment, does not militate against the defendant or change the relation between the plaintiff and the elevator operator.

The plaintiff was employed by the superintendent of the architectural office, while the elevator operator was employed by the superintendent of the building referred to, known as "The Grand Central Station;" the one as draughtsman and the other to render ordinary service in operating a lift or elevator; but the difference in grade of the employment or that they were in different departments does not aid the plaintiff, for they were both in a common employment for the same general purpose, the business of the defendant.

As said by Judge Folger in Slater v. Jewett, 85 N. Y. 61, 70, "There are many kinds of servants of a great railway company. Their duties are not in all cases the same, nor always like, yet they are all done to bring one result, and it is their conjoint simultaneous and harmonious performance that does effect the finality, sought through the whole complex organism."

It is true that the operation of the elevator here in question had, in itself, no bearing on or relation to the operation of trains or the work of the surveying and architectural offices of the defendant; but it had to do with making easy of access the various offices of the defendant by those having business relations with that "complex organism," the defendant's railroad, and plaintiff has made no claim that the operator of the elevator was incompetent for the performance of his employment.

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That the employees of a common master are working at different trades, at various kinds of work, in different branches and departments and whether in skilled or unskilled labor does not change the rule as to the master's nonliability to an employee for the negligence of coservants, if the master be himself free from concurring negligence. Slater v. Jewett, 85 N. Y. 61; Ross v. N. Y. Central, etc., Co., 5 Hun, 488; affd., 74 N. Y. 617; Besel v. N. Y. C. & H. R. R. R. Co., 70 id. 171; Butler v. Townsend, 126 id. 111; Corcoran v. D., L. & W. R. Co., Id. 673; Henry v. S. I. R. R. Co., 81 id. 373; Vick v. N. Y. C. & H. R. R. R. Co., 95 id. 267; Dooling v. Deutscher Verein, 97 App. Div. 39; Wilson v. Hudson River Water P. & P. Co., 71 Hun, 292; Monaghan v. N. Y. C. & H. R. R. R. Co., 45 id. 113; Gibson v. Northern Central R. R. Co., 22 id. 289; Carr v. North River C. Co., 48 id. 266; Mele v. D. & H. Canal Co., 59 N. Y. Super. Ct. 367; 39 N. Y. St. Repr. 153; McDonald v. N. Y. C. & H. R. R. R. Co., 63 Hun, 587; Byrnes v. N. Y., L. E. & W. R. Co., 113 N. Y. 251; Potter v. N. Y. C. & H. R. R. R. Co., 136 id. 77. The question is simply whether they are employed under a common control, for the general purpose of the employer's enterprise and business, and not doing that which is the master's duty.

Indeed, as said by Judge McAdam in Mele v. D. & H. Canal Co., *supra*, "*Prima facie*, all servants of a common master employed in the railway service are fellow servants and neither has a cause of action for the negligence of the other." See also Wilson v. Hudson River Water P. & P. Co., *supra*.

Here the elevator man, in operating the elevator at the time of the injury to plaintiff, was performing the detail of the work of an employee and was not the *alter ego* of the common master; he was not doing the master's duty, and my conclusion is that he and the plaintiff were fellow servants and that the defendant is not liable to the plaintiff for the negligence of the operator.

There is nothing in the contention that plaintiff, not having reached the particular office and room in which he put in his service or time, was not in the employment of the de-

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fendant. The place of his employment was the building, "The Grand Central Station," and he was in the employ of the master from the time he reached the place of employment; he was employed and paid by the month and at the time on his way to his particular room or office.

The maxim *res ipsa loquitur* does not apply to this case; the mere happening of the accident, the injury, does not justify an inference of negligence. The master is presumed to have performed his duty to the servant; but, if from the surrounding circumstances established, or from such as may be fairly inferred from the facts proved, it appears that the injury would not have happened with the exercise of reasonable care, then the doctrine that "things speak for themselves" applies, and the burden shifts to the master to explain the cause and to show his freedom from negligence. Griffen v. Manice, 166 N. Y. 188; Starer v. Stern, 100 App. Div. 393; Stackpole v. Wray, 99 id. 262. Indeed, "In no event could the doctrine be applicable until it is affirmatively shown that the fall was not due to negligence on the part of the operator, or the engineer or the fireman, who would ordinarily be coservants." Starer v. Stern, *supra*, 398.

In the case at bar there is no evidence as to the circumstances attending the injury other than that the door on the landing closed partly to, striking the plaintiff as he was stepping from the elevator, and that the elevator began to descend, throwing plaintiff to the floor and causing the injuries complained of. There is nothing to negative the suggestion that the movement of the door and the descending of the elevator might have been due to the negligent act of the operator; and there is no fact or circumstance shown wherefrom the negligence of the master may be inferred, or to justify an inference that the elevator or the machinery and apparatus used in the operation thereof were defective or out of repair.

Verdict for plaintiff set aside and motion to dismiss granted.

Verdict set aside and motion granted.

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THE CITY OF NEW YORK, Plaintiff, *v.* INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.

(Supreme Court, New York Special Term, February, 1907.)

Corporations — Power of corporation to make contracts and effect of ultra vires contracts — Incidental powers — Power of railroad company to maintain weighing machines at stations for use of passengers.

A corporation may engage in business incidental to its main business where it may become necessary, expedient or profitable in the care and management of its property.

The privilege of maintaining weighing and vending machines in the stations of a railroad company is incidental to the operation of the road and affords a great source of revenue; and their use and maintenance is practically a universal custom.

Where the city of New York, through its board of rapid transit commissioners, leases the subway to a railroad company without restriction or reservation as to the right of the lessee to maintain in its stations weighing and vending machines, such right passes to the lessee, so long as such machines do not in any way interfere with the use by the public of the railroad or deprive the public of any right to which it is entitled; and, where the proof shows that said machines are purposely placed where their obstructing or interfering with the public is absolutely impossible, the removal thereof will not be enjoined.

ACTION for an injunction. The opinion states the case.

G. L. Rives, for plaintiff.

C. A. Gardiner, for defendant.

MCCALL, J. This action was instituted by the board of rapid transit railroad commissioners in the name of the city of New York for the purpose of restraining and preventing the maintenance of weighing and vending machines in the stations of the railroad owned by the plaintiff and operated by defendant within the city of New York, which railroad is popularly called the "subway." The board of rapid transit commissioners is a body duly or-

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ganized and acting pursuant to the powers conferred upon it by chapter 4 of the Laws of 1891, and the acts amendatory thereof, commonly known as the "Rapid Transit Act." That act was passed by the Legislature of this State to comply with the demand of the people of the city of New York for speedy, safe and reliable transportation; and it authorized the said board to lay out routes for railroads and procure them to be built and operated, if not by private enterprise, then the city itself was empowered to build the railroads and lease them for a term of from thirty-five to fifty years upon payment of a rental not less than the interest upon the cost of construction and one per cent. additional. The railroads, if constructed by the city, were to remain its absolute property and to be deemed a part of its system of public streets and highways, to be used and enjoyed by the public upon the payment of such fares and tolls and subject to such reasonable rules and regulations as might be provided and imposed by the said rapid transit board. Sun Printing & Pub. Assn. v. Mayor, 152 N. Y. 257. Pursuant to the Rapid Transit Act a contract was entered into about the 21st day of February, 1900, with John B. McDonald for the construction of an underground railroad according to the plans and specifications submitted by the said board of rapid transit railroad commissioners, which railroad is now in operation, although the road as now operated was not all included in the contract hereinabove referred to. The contract provided that Mr. McDonald should equip the railroad and lease same from the city on the terms referred to above and operate it carefully and skillfully according to the highest known standards of railroad operation. On July 10, 1902, Mr. McDonald assigned his contract, so far as it related to the equipment, lease and operation of the subway, to the defendant company, which has operated the road since its completion about November 1, 1904. The road as operated maintains stations in which it has permitted to be placed automatic weighing machines by which passengers may ascertain their weight by standing upon a small platform and dropping a coin into a slot in the machine; and also certain vending machines whereby

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passengers may obtain chewing gum and candy by inserting a coin in the machine and pressing a lever. The question before this court is whether the city, through its rapid transit board, gave to the defendant the right to maintain these machines in the stations of the subway by the lease of the railroad and its appurtenances. This right is shown upon the trial to be worth $50,000 a year to the defendant, and it is strongly urged by the defendant's counsel that such machines are incidental to the operation of all railways, and that the lease of the subway to the defendant, being silent upon that subject, carries with it the rights incidental to the enjoyment of the leased property and all rights which plaintiff itself could enjoy had it operated the railroad instead of leasing it to defendant. Plaintiff's counsel, on the other hand, has argued with equal persistency that the instrument under which defendant operates the subway is a grant or franchise which must be most strictly construed against the grantee (citing Ogden v. Jennings, 62 N. Y. 526), and that, the instrument being silent on the question of right to maintain these machines, no such right can be implied. An application for an injunction *pendente lite* in this very action was made to my learned colleague Mr. Justice Bischoff (Interborough R. T. Co. v. City of N. Y., 47 Misc. Rep. 221), wherein he said: "The statute, which empowered the board to make the contract for the construction and leasing of the road, is very broad in its scope, and may well be read as authorizing the lease of the property in such a manner as to afford the lessee every benefit which custom attaches to the operation of a railway, and the contract itself recognizes the right of the lessee to maintain advertising signs upon the stations, since the manner in which the advertising matter shall be displayed is regulated by the contract. * * * Upon the question of custom, in the maintenance of railroad property, enough has been shown to support plaintiff's case, *prima facie,* and custom must enter into the inquiry as an important factor in the determination of the extent of this lessee's incidental powers of dominion over the property which is the subject of the lease. It is made to appear that advertising privileges and the mainte-

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nance of news stands afford a very extensive revenue which is customarily taken into account as a part of the legitimate earnings of railway property, and that the maintenance of news stands, vending and weighing machines and advertising signs is, as an incident to the operation of railways, practically universal. If this be the fact, as disclosed upon a full hearing, then, presumably, the contract had reference to the custom, and the statute intended the existence of power in the board to contract accordingly, since the maintenance of a railroad, according to the modern standards, was to result from the enterprise undertaken." Upon the trial had it has been demonstrated that these various privileges are incidental to the operation of a road; that they afford a great source of revenue, and their use and maintenance is practically a universal custom. This court cannot now, in the guise of an action to restrain the maintenance of these machines, reform that contract or make a new one for the parties. The lease gives the plaintiff no right to re-enter the demised premises except upon the violation of the terms of the lease by the defendant; and it is clear that, if the defendant were restrained and prevented from maintaining these machines, the plaintiff could not enter upon the subway, maintain the machines and receive the revenue therefrom; so that the result of preventing their maintenance would be to deprive the defendant of a large revenue flowing from a perfectly legitimate source and based upon an almost universally established custom, without giving plaintiff any corresponding advantage. It is true that the defendant is bound to use the demised property as a railroad, but the instrument by which the defendant is in possession is none the less a lease. It is everywhere referred to as a lease, it partakes of all the qualities of a lease and plaintiff's position that it is a grant or franchise is untenable. "A lease for years is a contract between lessor and lessee for the possession and profits of lands and tenements on the one hand and a recompense by rent or other consideration on the other." McAdam Landl. & Ten., 127. "A grant is an absolute conveyance of property by the sovereign, and that conveyance is only defeasible by

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eminent domain upon proper compensation." Langdon v. Mayor, 93 N. Y. 129. "A franchise is a special privilege conferred by the government on individuals which does not belong to the citizens of a country generally by a common right." Bank of Augusta v. Earle, 13 Pet. 519. "A special franchise is the right granted to a corporation to construct, maintain or operate in a public highway some structure, intended for public use, which, except for the grant, would be a trespass." People ex rel. Metropolitan St. R. v. Tax Comrs., 174 N. Y. 417. The city has built and now owns a railroad, but it has leased it for a term of fifty years to the defendant. That instrument is not a grant nor is it a franchise, and it must be interpreted and read according to the rules of construction pertaining to leases. Plaintiff could lease nothing more than it had as landlord; it could not grant a right to the tenant to maintain machines upon the demised premises unless it could have maintained the machines itself. The plaintiff has assumed upon the trial the position that the board of rapid transit commissioners had the power, as suggested by Mr. Justice Bischoff, to permit the machines, but that, as nothing was said in the contract or lease, that power was not exercised, and so remains in the board to be exercised when defendant makes proper application and compensation. The board then possessed a power that was given it by an act of the Legislature authorizing it to build a railroad, and since it is conceded that it possessed the right to permit the maintenance of these machines in question, it must necessarily have secured that power as an incident to its right to construct the railroad, for the Legislature gave the city no other right. There has never been any serious doubt of the right of the municipality to use its property for purposes other than strictly public purposes so long as the primary public purpose is served. French v. Inhabitants of Quincy, 3 Allen, 9. There certain premises were granted to a town upon condition that it should not be used for any other purpose than as a town house. The town erected upon the premises a much larger building than was then required for town necessities and rented parts not so occupied for

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a tailor shop, clothing shop, bank, apothecary shop and saloon, and the court held that such use was not violative of the conditions upon which the premises were granted. That decision was followed in other States and in our own courts. The right to so utilize public property was discussed by the Appellate Division in the case of the New York Mail & Newspaper Transportation Co. v. Shea, 30 App. Div. 266, where it was held that the city had the right to permit the plaintiff company to carry its tubes for the transportation of mail across the Brooklyn bridge. The plaintiff in the case at bar, however, contends that, notwithstanding the power in the plaintiff to so utilize the subway, the defendant has no power to maintain the machines, and that such maintenance is *ultra vires* of the defendant. While it is true that in deciding whether any act is beyond the power of the corporation the courts must look into the circumstances of each particular case, yet that doctrine will always be reasonably applied. The proof shows that vending and weighing machines are now commonly maintained in railroad stations and on platforms of the elevated roads and in ferry terminal houses generally, in the city of New York and elsewhere. The right of the elevated railroad to condemn land was once questioned, because it permitted its property to be used for other than railroad purposes by allowing news stands on its stations; and the Supreme Court declared it to be an extraordinary proposition to say that the right of a railroad to condemn real estate could be questioned because it used some of its property for a purpose not strictly a railroad purpose, but which was a great convenience to passengers. Matter of Met. El. R. R. Co., 18 N. Y. St. Repr. 134. A large number of collateral uses of railroad property have been sustained, such as the right to maintain weighing machines (London & Northwestern R. R. Co. v. Price, L. R., 11 Q. B. D. 485), and a hotel and summer resort were held to be within the powers of a railroad (Jacksonville, etc., R. R. Co. v. Hooper, 160 U. S. 514), and the right of a ferry to run excursions with its surplus boats not needed for ferry purposes (Forest v.

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Manchester Ry. Co., 30 Beav. 40), and to maintain refreshment stands in stations (Flanagan v. Great Western R. R. Co., L. R., 7 Eq. 116); and in Brown v. Winnisimmett Co., 11 Allen, 326, the court stated that there was no rule or principle by which an act creating a corporation for a certain specific object could be construed as prohibitive of all other dealings not within the exact scope of its charter, and saying that a corporation may engage in business incidental to its main business where it may become necessary, expedient or profitable in the care and management of its property. It is thus clear that the maintenance of the machines in question would not be an act *ultra vires* of either of the parties hereto, and that had plaintiff not leased its property to defendant it would have had the right to maintain such machines as incidental to the operation of the subway. Having leased the road to the defendant without restriction or reservation as to this right, I am of the opinion that such right passed to the defendant as an incident to the enjoyment of the demised property, and that the defendant has the right to their maintenance so long as it does not interfere with the careful and skillful operation of the road according to the highest standard of railroad operation, and does not deprive the public of any of the rights to which it is entitled. The plaintiff has failed to show that the placing or maintaining of these various machines in any way interferes with the public's full enjoyment of all their rights; they have failed to establish that same in any shape constitute an obstruction or are in any way offensive, or by their existence on the various stations prove themselves a nuisance or annoyance. Quite to the contrary, the proof would establish and warrant the conclusion that they are purposely placed where obstruction or interference with the public is absolutely impossible; they are availed of by the traveling public as a convenience and privilege the removal of which would prove a deprivation of rather than the re-establishment of their rights. Being, therefore, of the opinion that the lease of the subway by the rapid transit board to the defendant gave to the defendant the right to maintain such machines so long

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as they do not in any way interfere with the use by the public of the railroad or deprive the public of any right to which it is entitled, judgment must be directed for defendant, with costs.

Judgment for defendant, with costs.

CLEMENS MULLER, Plaintiff, *v.* THE MANHATTAN RAILWAY COMPANY and INTERBOROUGH RAPID TRANSIT COMPANY, Defendants.

(Supreme Court, New York Special Term, February, 1907.)

Remainders — Remedies of remaindermen for injuries to estate — Erection of elevated railroad.

Limitation of actions — Disabilities and exceptions — Infancy and coverture — Period after termination of disability.

Under the last will of testator, who died in 1875 survived by his widow and six minor children, certain real estate in the city of New York was devised to the widow for life or widowhood, in lieu of dower, with remainder to the children or their descendants. The widow having remarried in 1888, the premises were thereafter sold under a judgment in partition. Since 1878, an elevated railroad has been maintained and operated in front of said premises under a claim of lawful authority and under a claim adverse to the purchaser at the partition sale and his predecessors in title and exclusive of every other right. In an action to restrain the maintenance and operation of said railroad in front of said premises and for fee and rental damages; held, that, notwithstanding the intervening estate of the widow, a remainderman, under section 1665 of the Code of Civil Procedure, could have maintained such an action as for an injury done to his inheritance; that the remainderman's right to maintain such action first accrued upon the day in 1878 when the railroad company began to operate its road; that, as the eldest remainderman had, under section 375 of said Code, twenty years after she became of age in 1881 to commence suit, an action brought in 1899 by the purchaser at the partition sale who succeeded to all the rights of the remaindermen was not barred by the Statute of Limitations.

THE nature of the action and the material facts are stated in the opinion.

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Peckham, Warner & Strong (Charles H. Strong, of counsel), for plaintiff.

Charles A. Gardiner (Sherrill Babcock, of counsel), for defendants.

GIEGERICH, J. This action was brought to restrain the defendants from maintaining or operating their elevated railroad in front of the plaintiff's premises, situate at No. 849 Third avenue, in the borough of Manhattan, New York city, and for fee and rental damages. The complaint is in the usual form in such cases and the answer, among other things, sets up a prescriptive right to maintain and operate their railroad in front of the premises in suit by reason of an open, continuous and hostile occupation as against the plaintiff and his predecessors in title for a period of more than twenty years before the commencement of the action. The construction of the elevated railroad in front of the premises in suit was begun and completed by the New York Elevated Railroad Company in 1878, and operation was commenced thereon on December 30, 1878, and has been continued to the present time. The New York Elevated Railroad Company subsequently made and executed a lease of its railroad to the defendant Manhattan Railway Company. In 1878 the New York Elevated Railroad Company entered upon and took possession of Third avenue, in front of and adjoining the premises in question, for the purpose of constructing and operating their elevated railroad, and upon completion thereof commenced the operation of the railroad in front of the said premises on the 30th day of December, 1878. Prior to the commencement of this action the New York Elevated Railroad Company and the defendants, under claim of right adverse to the plaintiff and his predecessors in title, and exclusive of every other right, have been in possession of Third avenue in so far as the same is and has been required for the purposes of such railroad. Since such completion the said elevated railroad has been continuously maintained and operated by various companies

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as follows: By the New York Elevated Railroad Company until June 8, 1891, by the defendant Manhattan Railway Company from the latter date until April 3, 1903, and since last-mentioned date to the time of the trial by the defendant Interborough Rapid Transit Company; and said railroad was so constructed, maintained and operated under a claim of lawful authority and right to construct and operate the same. The said railroad, during the period aforesaid, has been continuously maintained and operated by means of such possession and user, and such entry, possession, maintenance and operation have been open and notorious and under a claim of right adverse to the plaintiff and his predecessors in title and exclusive of every other right. The defendants' structures in front of the plaintiff's premises, consisting of two tracks with longitudinal and cross-girders and their appurtenances, were erected in 1878, and have been continuously and uninterruptedly maintained and trains operated thereon since the 30th day of December, 1878, down to the date of the trial; and such elevated railway structure is a permanent structure, and the intention is to operate it permanently. It further appears from the evidence that by reason of the maintenance and operation of the defendants' elevated railway structure and trains the easements of light, air and access of the plaintiff have been appropriated. These facts are relied on by the defendants to support their claim to title by prescription. The doctrine of prescription and the reasons underlying the same are fully discussed in Scallon v. Manhattan R. Co., 185 N. Y. 359, where the court, at page 363, say: "Adverse possession and prescription are closely related. The one is regulated by statute and the other by common law, which has adopted twenty years as the prescriptive period from analogy to the Statute of Limitations. Code Civ. Pro., §§ 369, 371; Lewis v. N. Y. & H. R. R. Co., 162 N. Y. 202, 223. Adverse possession is the open and hostile possession of land under claim of title to the exclusion of the true owner, which, if continued for twenty years, ripens into an actual title. Baker v. Oakwood, 123 N. Y. 16. Prescription rests upon the presumption of a grant of incorporeal rights that has become lost and after

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the lapse of twenty years the presumption ripens into a title also. It is measured by user and the adverse use must commence in the same way, continue for the same period and be of the same character as the adverse possession required to give title to real estate. Lewis case, *supra*, 224. The close connection between the two methods of acquiring property makes it reasonable and natural to extend the analogy to the subject of disability." The plaintiff claims that the statute does not apply, because, when the cause of action first accrued, the persons then entitled to the remainder in fee were infants. The premises in suit were bought by one John Lang in April, 1868. He died on January 30, 1875, leaving a will by which he devised the premises in suit to his widow, Caroline, "to be used and enjoyed by her during the term of her natural life or widowhood." This was in lieu of dower. "And from and immediately after her decease, or after her remarrying again, I give, bequeath and devise the same to my children or their descendants, to be divided equally between them, share and share alike, the descendants of any deceased child or children taking the share such deceased child or children would have taken if living." He left him surviving his widow and the following named six children, who were born as follows: Fredericka, August 20, 1860; Caroline, July 17, 1864; Joseph G., June 30, 1866; Charles, September 14, 1868; William, October 18, 1870, and John, December 1874. Charles died in 1897, William in 1901, and John in 1875. The widow married one John Andre on June 27, 1888, and the plaintiff acquired title upon a sale had under a judgment in an action for partition on June 8, 1891. It will thus be seen that, when the elevated road was first operated in front of the premises in controversy, viz., on December 30, 1878, the widow was entitled to an estate in the premises until her death or remarriage, and the question arises whether such intervening estate would have prevented the bringing of an action by the remaindermen. The statute then in force provided that, "A person, seized of an estate in remainder or reversion, may maintain an action of waste or trespass for an injury done to the inheritance, notwithstanding an intervening estate for life or years." 1 R. S. 759.

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§ 8. Section 1665 of the Code of Civil Procedure, which superseded such statutory provision, provides that, "A person, seized of an estate in remainder or reversion, may maintain an action founded upon an injury done to the inheritance, notwithstanding an intervening estate for life or years." There was thus, at the time of the invasion of the remaindermen's incorporeal right, and there has been ever since, express legislative authority for the maintenance of an action by a remainderman for injury to the inheritance. Further authority for such an action is furnished by the case of Thompson v. Manhattan R. Co., 130 N. Y. 360, where similar relief was sought, and it was held that the maintenance and operation of the elevated railroad was a continuing trespass upon the rights of the remaindermen, and such trespass was an injury to the inheritance, and that the action could be maintained notwithstanding an intervening estate for life. The right of an infant remainderman to bring an action similar to this by a guardian *ad litem* was expressly sanctioned in the more recent case of Walsh v. Brooklyn Union El. R. R. Co., 69 App. Div. 389. Since the remaindermen had the right to maintain the action when the defendant's predecessor began to operate its railroad in front of the premises in question, it is evident that the doctrine of the case of Scallon v. Man. Ry. Co., *supra*, relied on by the defendant, is not applicable to the case at bar. There the statute had begun to run against the ancestor when the cause of action first accrued, and it was held that the supervening disability of the plaintiffs by reason of their infancy could not operate to defeat the defendant's claim to title by prescription. As was said by the court in that case (pp. 363, 364): "If infancy exists when the cause of action first accrues, the time for commencing the action is extended for a certain period after the infant becomes of age. If, on the other hand, the statute has already begun to run against the ancestor, it is not interrupted by his death and the supervening disability of his infant heirs. An adverse possession commencing in the lifetime of the ancestor will continue to run against the heir, although he is an infant when his right accrues." While the widow might have maintained an action to recover rental damages

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(Knapp v. N. Y. El. R. R. Co., 4 Misc. Rep. 408), such right, as above shown, did not prevent the infant remaindermen from maintaining an action to restrain the maintenance and operation of the railroad and for damages. Thompson v. Manhattan R. Co., *supra*. See also Kernochan v. N. Y. El. R. R. Co., 128 N. Y. 559; 161 id. 339; Winthrop v. Manhattan R. Co., 17 App. Div. 509. The right of the infant remaindermen to maintain the action is, therefore, abundantly established. The next question is, When did such cause of action first accrue? The answer is found in the Scallon case, which fixes the time when the defendants completed their elevated railroad and began to operate it as the time when an action could be commenced. The evidence shows that defendant's predecessor in interest first began to operate its railroad in front of the premises in suit on December 30, 1878, and, applying the ruling in the Scallon case, it must be held that the right of the remainderman to maintain an action of this character first accrued on the date last mentioned. It is urged by the defendants, however, that the claim of Fredericka Lang and her successors in title is barred by limitation; and in support of such contention it is argued that an infant has only twenty years in which to bring his action, and as much more as is necessary to give him ten full years in which to bring the action after becoming of age. Section 375 of the Code of Civil Procedure provides that: "If a person, who might maintain an action to recover real property, or the possession thereof, or make an entry, or interpose a defense or counterclaim, founded on the title to real property, or to rents or services out of the same, is when his title first descends, or his cause of action or right of entry first accrues, either: (1) Within the age of twenty-one years, or (2) Insane, or (3) Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life. The time of such a disability is not a part of the time, limited in this title, for commencing the action, or making the entry, or interposing the defense or counterclaim; except that the time so limited cannot be extended more than ten years after the disability ceases, or after the death of the person so disabled." The Court of Appeals, in Howell

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v. Leavitt, 95 N. Y. 617, in construing this section, passed upon a question precisely similar to the case here involved. There it was contended that the Statute of Limitations had barred the right of one Louise M. Howell. She became of age on December 31, 1864. The person claiming title as owner, one Roberts, got possession on March 15, 1858, under a writ of assistance issued in a foreclosure suit in which he had been the purchaser. The action in the Howell case was begun on November 7, 1878. The court, in holding adversely to the contention that the plaintiff's right was barred, said (p. 622): "The effect of this contention would be to cut down the twenty years' limitation to a little over sixteen years by reason of a disability of infancy. In a case where the cause of action accrued to an infant twenty years of age the limitation would be cut down to eleven years, and that which was intended for the relief and benefit of a person under disability is made to operate as a positive injury. We have already declined to adopt that construction. Acker v. Acker, 16 Hun, 174; 81 N. Y. 143. The exception of the Code relates to the extension of the time limited, and puts restraint only upon that extension. It means that the disability shall not add more than ten years to the time limited after the disability has ended. Practically, in the case of infancy, it makes the extreme possible limitation a period of thirty-one years." The principle of that case was expressly recognized and affirmed in Darrow v. Calkins, 154 N. Y. 503, and in the more recent case of Sanders v. Riedinger, 30 App. Div. 277. Applying the doctrine of these cases to the present case it is clear that the right of neither of the remaindermen has been barred. When the operation of the elevated railroad in front of the premises was begun on December 30, 1878, Fredericka was an infant of the age of eighteen years. Under the authority of the cases cited she had twenty years after she became of age on August 20, 1881, to commence suit, as this would not result in an extension of more than the ten years permitted by the statute. The action was begun on February 21, 1899, and was, therefore, brought in season. The same result follows in the case of the shares of the other infant re-

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maindermen who, as seen above, were all younger than their sister, Fredericka. The plaintiff, as the purchaser at the partition sale, succeeded to all the rights of the remaindermen and stands in their shoes. Pappenheim v. Metropolitan El. R. R. Co., 128 N. Y. 436. I have passed upon the requests to find submitted by each of the parties litigant, as indicated upon the margin thereof, and from the facts found I am of the opinion that the plaintiff is entitled to judgment, including injunctive relief, with costs, and an extra allowance of $80, with rental damages at the rate of $96 per annum and $1,600 fee damage. The papers have been left with the clerk in order that an engrossed copy of the complete decision may be made and submitted for signature.

Judgment accordingly.

ALONZO B. GARRETT, Plaintiff, *v.* BIANCA E. DUCLOS et al., Defendants.

(Supreme Court, New York Special Term, February, 1907.)

Trusts — The beneficiary, his estate, rights and interest — Alienability of interest — Trusts of personal property.

Where a certain sum of money is bequeathed to executors in trust to invest and to pay the net income thereof to testator's two sisters in equal shares and to pay the entire net income to the surviving sister, and upon her death to pay over the *corpus* of the trust estate to such person or persons and in such manner as such surviving sister shall during her lifetime by will or otherwise have directed, the right of each of the beneficiaries in the trust fund is, under section 3 of the Personal Property Law (L. 1897, ch. 417), incapable of transfer by assignment or otherwise; and an assignment by the beneficiaries of both the income and the *corpus* of the trust estate is ineffectual to frustrate the testator's purpose to provide a life income for each of them and cannot be enforced.

ACTION to declare trust terminated and to recover trust estate

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Edward J. Maxwell, for plaintiff.

Gibson Putzel, for defendants.

BLANCHARD, J. The complaint sets forth a will providing as follows: "First. I give and bequeath unto my executors hereinafter named, or such of them as may qualify, the sum of twelve thousand dollars, for them to have and to hold the same in trust nevertheless, to and for the following uses and purposes, namely: To invest and keep the same invested, to receive the rents, issues and profits thereof, and to pay one-half of the net rents, issues and profits so received to my sister Adelaide Duclos during the term of her natural life, and the remaining one-half of the said net rents, issues and profits to my sister Amalia Duclos during the term of her natural life; upon the death of either one of my said sisters, whichever one shall die first, to pay the entire net rents, issues and profits to the surviving sister during the term of her natural life; and upon the further trust at the death of the surviving sister to transfer and pay over the principal or *corpus* of the estate held in trust as aforesaid to such person or persons and in such manner as said surviving sister shall during her lifetime by will or otherwise have directed." Adelaide Duclos and Amalia Duclos have both assigned to the plaintiff herein all their rights to the income and to the *corpus* of their respective legacies. The plaintiff then tendered to the defendants, who are trustees under the will, certain instruments by which they claim said assignment, and have demanded the delivery of the *corpus* of the trust. The defendants have refused to comply with the demand. The complaint prays that the trusts be terminated and that the defendants be directed to pay over the trust fund to the plaintiff. The defendants demur on the ground that no cause of action is stated. Article 1, section 3, of the Personal Property Law provides as follows: "The right of the beneficiary to enforce the performance of a trust to receive the income of personal property, and to apply it to the use of any person, cannot be transferred by assignment or otherwise; but the right and interest of the beneficiary of any other

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trust in personal property may be transferred. Whenever a beneficiary in a trust for the receipt of the income of personal property is entitled to a remainder in the whole or a part of the principal fund so held in trust, subject to his beneficial estate for a life or lives, or a shorter term, he may release his interest in such income, and thereupon the estate of the trustee shall cease in that part of such principal fund to which such beneficiary has become entitled in remainder, and such trust estate merges in such remainder." According to the first sentence of this section the assignment by Adelaide Duclos and Amalia Duclos to the plaintiff of their respective interests was forbidden by law. Lent v. Howard, 89 N. Y. 169; Graff v. Bonnett, 31 id. 9. The fact that this illegal act, if effectual, would have merged in the same person the life estates and the remainder in the fund, and, therefore, apparently bring the case within the second sentence of the section above quoted, cannot avail the plaintiff. Not only is the initial illegality of the assignment an insuperable bar to the effectuation of the plaintiff's purpose, but the very endeavor of the plaintiff to accomplish, in the indirect manner described, the evasion of the statute and the frustration of the testator's purpose to provide a life income to Adelaide Duclos and Amalia Duclos will not be countenanced by the courts. Metcalfe v. Union Trust Co., 87 App. Div. 144, 149; affd., 181 N. Y. 39, 48.

Demurrer sustained.

MICHAEL J. CUMMINGS et al., Plaintiffs, *v.* EDWIN BAILEY, JR., et al., Defendants.

(Supreme Court, Kings Special Term, February, 1907.)

Election of officers — Nominations, etc. — Committee — Democratic State committee may not expel its duly elected members.

The State committee of the Democratic party, which has no constitution or bylaws but which controls the State convention of the party and the nominations for public officers made by it, is under

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existing law elected by delegates from the respective senatorial districts and no power resides anywhere to reject their choice. Therefore, the attempted expulsion by a majority of said committee of the representatives from Kings county will be enjoined.

SUIT to enjoin the defendants from expelling plaintiffs from membership in the Democratic State Committee.

Isaac M. Kapper, Luke D. Stapleton and George W. Martin, Jr., for plaintiffs.

Thomas F. Magner and John F. Carew, for defendants.

KELLY, J. If the State committee as at present organized and constituted is a mere voluntary association, not representative in character, and the right to membership depends upon the action of the body itself, then its members have no right to appeal to the courts to interfere in its management. In that case, to quote from Judge Gray in McKane v. Adams, 123 N. Y. 609, membership is a privilege which may be "accorded or withheld and not a right which may be gained independently and then enforced."

If, on the other hand, it is a representative body and the plaintiffs are members by reason of their selection by agencies outside the committee itself, if their membership is a right gained independently of the committee and they are responsible to those electing them for their conduct and only to them, a different rule prevails. People ex rel. Coffey v. Democratic Committee, 164 N. Y. 335.

The plaintiffs are the members of the State committee representing the various senatorial districts of the county of Kings. They are the choice of the Democratic voters in that county as expressed at the primary election of 1906. The procedure with reference to the election of delegates to State conventions of political parties, and the formation of State committees, have been the same for many years, at any rate since the passage of the primary election laws. Laws of 1882, chap. 154; Laws of 1883, chap. 380; Laws of 1887, chap. 265; Laws of 1898, chap. 179, and Laws of 1899, chap. 473.

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There is no specific reference by name to either State conventions or State committees in the present Primary Law, but the State conventions and the State committees are the outcome and result of the assembly district conventions, and the means by which the will of the voter is carried out. The individual voter selects the members of the assembly district convention which, in turn, selects delegates to the State convention by senatorial districts, one delegate from each assembly district. The delegates representing the assembly districts comprised in a senatorial district in caucus select a member of the State committee to represent that district and certify his election to the secretary of the State committee. It all originates at the primary election. So far as the localities are concerned in which the Primary Election Law is in force, the representatives of the senatorial districts in those localities are selected by means of the machinery provided by the law. The plaintiffs in this case were selected by the Democratic electors voting at the primary election held in September, 1906, as effectually as if they had been directly voted to membership in the State committee at that election. It is in evidence that each of the plaintiffs, with the exception of Mr. Shea, is a member of the Kings county Democratic general committee and was elected a delegate to his particular assembly district convention at that primary election. With his fellow delegates to that assembly district convention, he selected the representatives in the State convention by senatorial districts, and by those representatives he was chosen to represent his senatorial district in the State committee.

What is the State committee? According to the evidence it has no written constitution or by-laws. But it is the supreme political authority of the party in the State. It is conceded by the defendants on the record in this trial that the State committee has plenary powers, not only as to the State convention, but that it controls the State convention; that it is the executive body of the Democratic party in the State of New York. The State committee, as already suggested, is not chosen by the State convention. It is elected by the delegates from the respective senatorial districts. The

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members of the State committee may be elected at a different time or place from that appointed for the holding of a State convention. No power, discretion or choice exists, according to the evidence, in the State convention, or any one else, to reject the choice of the senatorial districts. By virtue of that choice or selection he becomes a member of the committee. The witness Mason, secretary of the committee, testified that, outside of nominating candidates for State officers, perfecting its own organization and adopting a platform (which acts are performed by the State convention), "everything looking toward the government of the party, the election of the candidates and the means and method of doing it is performed by the State committee."

But more than this, the State committee practically controls the State convention and the nominations for office made by that body. The members of the State committee are elected for two years. They issue a call for the State convention. In advance of the meeting of the convention they select temporary officers for that body; these temporary officers select the committee on credentials which, in its turn, controls the seating of delegates. The concession of counsel as to the plenary powers of the State committee was properly made. The committee controls the party convention and the nominations for public office made by the convention. It is in evidence that, at the State convention of 1906, it was resolved that no State convention of the Democratic party should be held in 1907; that the State committee, consisting of the plaintiffs and defendants in this action, should nominate candidates for any State office to be filled at the general election in November, 1907. The State convention knew, and we knew, that one of the offices to be filled at that election, of the utmost importance to the people of the State, a judge of the Court of Appeals, was to be selected; other important State offices may become vacant by death, resignation or otherwise; if so, this State committee selects and nominates the candidates of the Democratic electors for those offices. I do not think that such a body should be said to be a mere voluntary association, member-

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ship in which is not dependent on outside agencies. As long as the maintenance of political principles are important to the citizen and the welfare of the community, a body with the powers conceded to this committee is of the highest importance. Having in view the method of the selection of its members, its powers and the results which may flow from its action or inaction, I am free to say that the expulsion of the plaintiffs, the representatives of an entire community as important as the Democracy of Kings county, and the substitution in their stead of committeemen selected by the defendants, the majority of the State committee, seem violative of all modern, and what we have grown to believe are better and more representative, methods of political procedure. It is no part of the court's duty to say whether written constitutions or by-laws are necessary or desirable in bodies of this description; but I do assert that, if any such power exists in a body such as this, it ought to be expressly declared in unmistakable terms. The learned counsel for the defendants, on the argument and in his brief, urges that the committee might be compelled to associate with a man who may have "violated every rule of propriety" and "have been guilty of the most indecent conduct;" he may "have outraged every rule of civilization;" he may be ill "with a contagious or infectious disease so as to make association with him a menace to one's life or health, yet it is the contention of these plaintiffs, under such circumstances, if they should arise, the committee is powerless to be rid of such a person." This is strong language, and yet the alternative of vesting in a majority of men — human beings and subject to the infirmities of human nature — the unrestricted right to judge these things, to convict a man of these indecencies and outrages, and for that alleged reason to expel him from a representative office, depriving those who have a right to be represented of representation, and substituting the opinion of the majority, moved by motives which we may not always know, for the opinion of those who know him and deliberately select him to represent them, appears to me to be more dangerous to our institutions than the extreme supposititious case presented by the learned counsel for the defendants.

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A similar situation to that alleged in the case at bar was before the Court of Appeals in the Coffey case (*supra*), and Judge Parker in the prevailing opinion said: "It has been suggested that it would be intolerable for the members of a general committee to associate with a member who is hostile to the ticket, and that it follows that the legislature must be presumed to have had such a situation in mind. I answer — without assenting for one moment that the legal conclusion follows from the proposition of fact standing alone — that it does not stand alone; that the legislature was confronted with what it regarded as an abuse of the rights of the citizens in party matters, which compelled it to decide which was the lesser of two evils, to compel association occasionally with a member who is hostile to some portion of the party candidates or a majority of the committee, or to permit the general committee to deprive the voters of the choice of a representative. It decided that the wrongs that had been and were being done to the primary voters exceeded that which could result from occasional association with a hostile member. In other words, it was determined that the majority of the primary voters were entitled to select any representative they might desire, who should be responsible to those electing him, and only to them, for his conduct in office. That determination should be given effect by the decision of this court agreeably to that well-understood canon of construction that commands the court in construing a statute to give effect to the intention of the legislature." Any such extreme, arbitrary power as claimed by defendants in their answer should not be asserted without express authority; and to say it exists in a body selected as are our great party committees and with the privileges, powers and duties devolved on them and exercised by them, seems to me to be un-American and opposed to the fundamental principles of government in this country which makes the individual's right to have a voice in the selection of his representatives sacred and inalienable.

It is true, this unrestricted rule by might instead of right prevailed in this community in times gone by. It still prevails in some parts of this State, but it is wrong. It fosters

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oppression and a long line of evils from which we suffered here in the past. There is no reason for it. A State committee or a State convention may, if it sees fit, adopt a constitution and by-laws providing for all reasonable contingencies; and with such a constitution or law the courts would be slow to interfere. It is in the assumption of authority not prescribed or declared that the danger lies. And how can the danger be exemplified more strongly than in the attempt of a majority to expel the duly accredited representatives of the minority? Not content with the conceded power to control the action of the committee, they, by sheer force, seek to deprive the minority of all representation. If it be said that the Legislature has no right to interfere and prescribe tests for membership in a political party, I think the answer is, that we are dealing here with an organization which has voluntarily accepted a statutory method by which it is constituted a representative body and not a mere voluntary association. The individual voters who went to the polls in September, 1906, selected their representatives under laws as they then existed. They availed themselves of the statutory forms and paraphernalia of a public election. There is no right in the Legislature to prescribe party principles. There is and can be no legislative prohibition against any number of citizens organizing and declaring their political beliefs and advocating them and electing public officials in accord with their views. But where a State committee is elected by districts, it can only be for the reason that it represents the views of the electors in the districts; and it cannot, on the spur of the moment, change its representative capacity. This present committee was selected before the State election of 1906. No attempt was made to disfranchise the electors of Kings county by removing their representatives before the election. The Democratic voters in Kings county went to the polls and exercised the franchise without intimation of any intention to remove their entire representation in the councils of the party. Apparently the defendants, the majority of the State committee, did not deem their association with the representatives from Kings county intolerable during the period between the nominations and the election

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which resulted in the success of all but one of their nominees. This movement to expel the Kings county representatives in the State committee was announced a day or two after the result of the election had been announced. This does not seem to be fair dealing with the individual voter; I do not believe it is lawful, and I think the court should interfere to prevent it.

If the representative character of the State committee be conceded, I think a court of equity has power to interfere with an unlawful attempt to expel a member of such committee. Having in mind the conceded powers of the committee over the destinies of the party, their power to make nominations and to control the workings of the party machinery, it would not be just to relegate the plaintiffs to a mandamus proceeding or to a suit for reinstatement. During the delays incident to such proceedings, the wrong to the community may be accomplished, the voice of the locality may be stifled, while its representatives are struggling to regain the office from which they have been unlawfully removed. If the proceeding is illegal, it is wrong that these plaintiffs should be forced to submit to the expense and humiliations of a public trial, before a self-constituted tribunal, acting without lawful authority. Schuyler v. Curtis, 147 N. Y. 434. Mr. Justice Herrick said, writing for the Appellate Division in Green Island Ice Co. v. Norton, 105 App. Div. 332: "The remedy by injunction is one that is constantly growing and expanding, and injunctions are now granted in cases where formerly the courts would not have thought for a moment of so doing. From time immemorial it has been the rule not to issue an injunction where the party praying for it had an adequate remedy at law, but our ideas of what are adequate remedies are changing, and it is gradually coming to be understood that a system of law which will not prevent the doing of a wrong, but only affords redress after the wrong is committed, is not a complete system, and is inadequate for the present needs of society, and that where the rights of the parties are clear the courts should intervene to prevent a violation of such rights; should prevent the doing of the wrong in the beginning, instead of

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allowing such rights to be violated and such wrongs to be done."

From the nature of the accusation and the violence of the language used with the prayer of the accusers that plaintiffs be expelled, there can be little doubt of the object and result sought. In the papers presented to me on the granting of the preliminary injunction in this case, which was continued by consent of the parties until final judgment after the trial, there were allegations that the majority of the committee had prejudged the case and that the so-called trial was an empty form. It was averred that the chairman of the committee had publicly announced in statements widely published that the plaintiffs were to be expelled. On the trial no direct evidence of this intention was introduced by plaintiffs, nor was any evidence to the contrary offered by defendants. The nature of the proceeding and its obvious outcome is claimed by plaintiffs to be apparent from the intemperate wording of the charges, the acceptance of these charges by the majority of the committee and the appointment of the subcommittee to try the plaintiffs. I think there can be little doubt of the intention of the defendants to expel the plaintiffs on the facts presented, especially in view of the allegation in paragraph VIII of the answer, which reads as follows: "That these defendants have and claim the right under the Constitution of this State and of the United States to investigate the charges preferred as hereinbefore set forth, and as the Democratic State committee of the State of New York in the exercise of their discretion and judgment, if said charges be deemed established, to curtail the powers of these plaintiffs or to expel them if they so determine."

Quoting from Mr. Justice Herrick, at Special Term (Matter of Broat, 6 Misc. Rep. 445): "Recent legislation has been such as to bring within the law the action of all party caucuses, conventions and committees, and subject them to the supervision and control of the courts. It has at last become recognized that, under our form of government, the primaries, caucuses and conventions of parties should be surrounded by all the safeguards, and be conducted with the

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same conformity to law, that our regular elections should be, and whether they have been so conducted is to be determined by the courts in the same manner as every other controversy that is brought before it. In Matter of Woolworth, 16 N. Y. Supp. 147, 152, the court said 'Where the duty is cast upon courts and judges of determining the regularity and fairness of political methods, those methods must be subjected to the same tests as would those of any other body of men whose good faith is questioned, and no court or judge would be justified in sustaining them when found to be inconsistent with that degree of sound morals which must characterize an ordinary affair of business, even though they be recognized and approved by senatorial and state conventions of the same political organizations. The trend of public opinion, as well as of legislation, at the present time, appears to be in favor of a radical reform in our political methods, and it is the plain duty of all good citizens and especially those clothed with judicial authority, to encourage such a sentiment with all the force they can command."

I think the defendants, constituting the majority of the State committee, have no power under existing conditions, without any authority by way of constitution or by-laws, to expel the plaintiffs, representing the Democratic electors of Kings county. I, therefore, direct judgment for the plaintiffs.

Judgment for plaintiffs.

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FREDERICK M. HILTON, as Trustee, Plaintiff, v. PINCUS SOWENFELD et al., Defendants.

(Supreme Court, New York Special Term, February, 1907.)

Wills — Interpretation and construction: Terms defining quantum or duration of estates or interests — Rules and implications — Words of inheritance or purchase — Gift over to "issue"; Administration of estate and execution of powers, etc. — Rules and implications — Power of one executor to execute power given to several.

Trusts: The beneficiary, his estate, rights and interest — Alienability of interest; Execution and administration of trust — Powers of co-trustees.

Where a testator devised his real estate to his excutors in trust to apply the net income of the estate to the support of his wife, whom he appointed one of three executors and trustees, and authorized his executors, with his wife's consent, to sell and convey his real estate and required that such consent be set forth and appear before any sale should be valid and that no sale should be valid without the signature to the conveyance and acknowledgment of the execution of the same by his wife as executrix, held, that the power of sale could not be exercised by the wife alone, she being the only one of the executors and trustees to qualify, and that a title depending upon her attempted exercise of such power was not a marketable title.

And where, in order to make good the defect, a deed from the remaindermen was tendered, it was held that such a deed could not cure the infirmity in the title, as the interest of the executrix herself as beneficiary of the trust was inalienable and would not pass by her deed as executrix or otherwise.

And where the testator further provided that after the death of his wife his estate should be divided into four shares one of which he gave to each of his four children providing that, if any child should die before attaining his majority leaving no legal issue, the share of such child should go to the other children and further providing for distribution of the shares among the children by lot, or, in case any child objected, then, for a sale by the executors and trustees and a gift of the proceeds to his said children "or the legal issue of any or all of the same", one of the children who executed the deed tendered to perfect the title being a married son, whether his share was not liable to be divested by the birth of lawful issue and his death prior to the death of the executrix who was also the life tenant, *quære*.

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ACTION to compel the specific performance of a contract for the sale of real estate.

Dittenhoefer, Gerber & James, for plaintiff.

Arnstein & Levy, for defendants.

McCALL, J. In his lifetime one Thomas F. Carhart acquired by purchase the premises known as No. 68 Spring street, in this city. He subsequently died seized of the fee to these premises, and left a will under and by the terms of which he named Marie L. Carhart, Edmund H. Carhart and John B. Van Wagenen as executors and trustees. These three representatives of decedent's estate subsequently acquired by purchase the title to the adjacent piece known as No. 70 Spring street, and thereafter two of said trustees filed their accounts and were allowed to resign, and a decree was entered releasing them as such executors and trustees. Frederick M. Hilton was appointed to succeed Edmund H. Carhart, and some time after the remaining one of the original three was removed, leaving Hilton as the sole acting executor and trustee. In such capacity and on the 6th day of September, 1905, he entered into a contract for the sale of both above-mentioned properties with the defendants herein, title to close on the 6th day of December, 1905. By a series of adjournments mutually agreed upon the closing of title was postponed until the 20th day of December, 1905, upon which date, at a time and place fixed, the plaintiff tendered his deed and the defendants refused to accept same or complete their contract, asserting that the title offered was unmarketable and the cloud on or the defect in title affected only the premises known as No. 70 Spring street. This purchase was made by the plaintiff's predecessors in the trust, and was an asset of the estate when he began the performance of his duties. The history of the title to this particular piece prior to its vesting in the estate of plaintiff's decedent is as follows: One George L. Osborn in his lifetime was the owner. He died in 1876, leaving him

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surviving his widow and the four children named in his will, all of whom are living to-day. Charles, the son, is the only one married, but there is no issue of such marriage. He also left a last will and testament, upon which, in so far as the issues of this litigation are concerned, the following extracts therefrom have a bearing: "Item. I give, devise and bequeath unto my executors and executrix hereinafter named all my estate, both real and personal, of every nature and kind, that is not hereinbefore nor hereafter specifically bequeathed in trust, to receive the rents, issues and profits thereof, and the same to pay over to my said wife, Sarah Esther Osborn, as the same may be received after first deducting from the same all legal charges, and I authorize and empower my said executors and executrix, with the written consent of my said wife, Esther Osborn, to sell, convey, transfer or mortgage any or all of my real or personal estate, and with the like written consent of my said wife to reinvest the proceeds as they in their best judgment may see fit, and again in like manner to alter or change any and all of such investments and the rents, issues and profits of such new investments, in like manner to pay over to my said wife, Sarah Esther Osborn, during the term of her natural life; and I hereby declare that by this item I intend, first, that it shall be in lieu of dower, right of dower or any other claim, right, title and interest of my said wife, Sarah Esther Osborn, in and to my estate or any part thereof, and her acceptance of the income of my estate as hereinbefore named or her acting as my executrix as hereinafter provided shall be a perpetual bar both in law and in equity to any claims made by her on or to the principal of my estate or any part thereof; and, second, I intend that no change shall be made in the investments of the capital of my estate without the written approval of my said wife (she surviving me), to be signified first by her written consent in her individual capacity as my wife, and such consent and approval must be set forth and appear before any sale, transfer or conveyance can or shall become lawful or valid; and, second, no such sale, transfer or conveyance shall or

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may become lawful or valid without the signature to and acknowledgment of the execution of the same by my said wife, Sarah Esther Osborn, as the executrix of my estate." "Item. After the decease of my wife, Sarah Esther Osborn, she surviving me, or after my decease, I surviving her, I hereby will and direct that all my estate, excepting such articles as are hereinbefore or hereinafter specifically bequeathed, shall, within one year, or sooner if the same can conveniently be done, be divided into four shares of equal value by my said executors, one of which shares I hereby give, devise and bequeath unto my daughter Helen Osborn, one of which said shares I give, devise and bequeath unto my said daughter Caroline Elizabeth Osborn, one of which shares I give, devise and bequeath unto my daughter Anna Jarvis Osborn, and the remaining share I give, devise and bequeath unto my son, Charles Osborn." "Item. If any of my said children should die before the age of 21 years and leaving no legal issue, then I will and direct that her or his share shall be equally divided among the remainder of my said children or the legal issue of any or all of the same." "Item. I will and direct that the distribution of my estate among my children in the manner hereinbefore stated shall be by lot, each of my said children or the legal issue of such being entitled to one equal one-fourth share of, in and to the same. But in case the said distribution by lot shall be refused by one or more of my said children or by all of the legal issue of one or more of the same, then I will and direct that my executors or their legal successors shall sell and dispose of all my estate at public auction, and from the proceeds thereof I give, devise and bequeath unto my said children, Helen Osborn, Caroline Elizabeth Osborn, Anna Jarvis Osborn and Charles Osborn, or the legal issue of any or all of the same, one-fourth of the proceeds of the sale of the said estate after deducting the reasonable costs and expenses of such sale." "Item. In case my wife, Sarah Esther Osborn, should survive me and should also survive all of my said children, and should also survive the legal issue of any and all of my said children, then

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after my death and after the death of all of my said children, and after the death of all of the legal issue of any and all of my said children, and not before, I give, devise and bequeath unto my said wife, Sarah Esther Osborn, absolutely, in her own right, all my estate, both real and personal, of every nature and kind whatsoever." The testator, by his will, also appointed his brother, Charles F. Osborn, his friend, Stephen Van Rensselaer Cruger, as executors, and his wife, Sarah Esther Osborn, executrix, and also trustees of the trust created. Mrs. Osborn alone qualified as executrix and trustee. She, on the 2d day of February, 1883, "as executrix and trustee of the last will and testament of George L. Osborn, deceased," conveyed these premises to the plaintiff's predecessor as "executor and trustee of the last will and testament of Thomas F. Carhart, deceased," the deed reciting that the conveyance was made "by virtue of the power and authority to her given in and by the last will and testament" of George L. Osborn, deceased, and thus whatever title the plaintiff has flowed to the estate he represents through this deed, fortified to such extent as will subsequently appear by a quitclaim deed executed and delivered the same day as the foregoing deed by the widow of George L. Osborn, Sarah E. Osborn, and all of testator's surviving children, to wit, the four named in his will, Helen, Caroline E., Anna J. and Charles, who were all adults of full age. These two links in the chain of title are the subject of the attack which creates the issues involved herein, and are presented in the questions: Was the widow, Sarah E. Osborn, who was the sole beneficiary and the sole trustee to qualify, competent to act as trustee in the execution of duties of the trust which, by the terms of the will, had originally been conferred on two others besides herself? And, if not, was not her act in attempting to exercise the power incapable of vesting a marketable title? My judgment is that the case of Haendle v. Stewart, 84 App. Div. 274, applies to the facts of the case at bar and is decisive thereof. She could not act as she attempted to, and the instrument executed by her did not pass a marketable title. This brings

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us to consideration of the question of whether or not the execution and delivery of the quitclaim deed in any manner helps the situation, and it must be seen that no matter what the intent of the parties their act was ineffectual. There are two distinct legal estates that must be carried to any proposed grantee from the Osborn estate, to wit: *First.* The legal estate in the trustees for the life of the widow, and, *second,* the legal estate in the remaindermen. No matter whether that be determined contingent or vested, and without both being transferred legally, the result is the possession by the grantee of an unmarketable asset if he should essay to transfer a perfect title to the whole. I have concluded that the trustee's act was illegal, and hence that estate never passed, and of itself this would be sufficient to refuse the decree asked for; but there are other features about this title that even were the trustee's act a valid one would cause considerable hesitancy in decreeing that defendant should take the interest these instruments purport to convey. By this quitclaim deed the beneficiary sought to assign her individual interest in the first estate, notwithstanding the positive inhibition to be found in the Revised Statutes, about which, in its rigorous and unbending application, our courts have said "neither court nor beneficiary can deal with it." Noyes v. Blakeman, 6 N. Y. 576; Metcalfe v. Union Trust Co., 181 id. 39. And, finally, I am not free from doubt on the question of these remaindermen's right to transfer. I confess I have been quite sorely perplexed over the proposition offered with my inclination so strongly against the taking of a title such as is proffered by the quitclaim instrument, that were it the only point upon which the rejection of title was based I would refuse decree requested. What are the conditions actually presented? One of these four children named in testator's (Osborn's) will is the son, Charles, whom the proof shows is married. If issue were born of that marriage, and Charles should predecease the widow, Sarah, leaving his issue him surviving, how would the court resolve the question of intent of testator as expressed in the excerpt of the Osborn will? (found *supra*).

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While I confess to much doubt, and while it does not need reiteration to establish the repeatedly announced doctrine of courts to seek a construction consistent with intent that favors absolute vesting, still each will stands by itself and upon its own basis when put to the test of judicial interpretation, and I am not satisfied with the condition offered on this point, and am inclined to the belief that these children of relator Osborn had a remainder subject to being divested, and, therefore, until the termination of the trust term this deed could not pass the fee to the whole remainder in testator's estate.

Judgment for defendants.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, v. MARC KLAW and ABRAHAM L. ERLANGER, Defendants.

(Court of General Sessions of the Peace, City and County of New York, February, 1907.)

Criminal procedure — Preparation for and matters preliminary to trial — Right to inspect minutes of grand jury.

A person indicted for a crime will be permitted in the Court of General Sessions to inspect the minutes of the grand jury when necessary to enable him to determine whether the indictment was found, indorsed and presented as prescribed by law, or whether a person was present during the session of the grand jury contrary to law, or whether the defendant's constitutional rights were invaded by the action of the grand jury in finding the indictment without evidence or upon illegal and incompetent testimony.

MOTION for leave to inspect the minutes of the grand jury, or for delivery to defendants of a copy of such minutes.

Isidor Kresel, assistant district attorney, for People, opposed.

Hoadly, Lauterbach & Johnson (Alfred Lauterbach, of counsel), for motion.

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CRAIN, J. This is a motion for leave to inspect the minutes of the grand jury, or for the delivery to the defendants of a copy of such minutes.

The motion is made on the ground that the defendants have not been furnished with a copy of the indictment, and that the indictment must remain a secret record until the arrest and arraignment of other defendants indicted jointly with the defendants herein; that the defendants are ignorant of the circumstances or allegations or testimony upon which the indictment was predicated; that no preliminary examination was had herein before any magistrate, and that the minutes are required to enable the defendants to prepare for trial, or to plead or make such motion as they may be advised.

Sections 250, 255, 256, 258, 265, 266, 312 and 313 of the Code of Criminal Procedure are the sections to be considered on this application.

A motion to inspect the grand jury minutes may have either one of two legitimate motives, namely, first, to enable a defendant to subsequently make a motion to set aside an indictment; and, second, to enable a defendant to go to trial more fully apprised of the nature of the accusation against him than he would be if he had nothing but the indictment before him.

The first reason for granting this application is that the precedents of this court require that it should be granted.

The application involves the manner in which the discretion of the court shall be exercised in a matter of practice. On such questions, where the authorities in the Court of General Sessions differ from those at Special Term of the Supreme Court, a judge of the Court of General Sessions will follow the authorities in the Court of General Sessions. This is necessary to insure in the Court of General Sessions uniformity of practice. An almost unbroken line of authorities in this court favor the granting of this application. Among the recent cases see People v. Molineux, 27 Misc. Rep. 60; Matter of Gardiner, 31 id. 364, 369; People v. Foody, 38 id. 357, and other cases.

Without restating the grounds upon which these and

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other decisions in this court rest, it is sufficient to say that such decisions rest upon unassailable grounds.

A motion to set aside an indictment may be made when it is not found, indorsed and presented as prescribed in sections 268 and 272 of the Code of Criminal Procedure, or where a person has been permitted to be present during the session of the grand jury while the charge embraced in the indictment was under consideration, except as provided in sections 262, 263 and 264 of the Code of Criminal Procedure, or upon the ground that the defendant's constitutional rights have been invaded, as by finding an indictment without evidence, or wholly upon incompetent and illegal testimony.

The second reason for granting the application is that the stenographer's minutes of the grand jury are the best evidence as to whether, with respect to a particular indictment, the grand jury have or have not acted without evidence or upon illegal and incompetent testimony, and that to deprive a defendant of such minutes is in most cases to deprive him of the opportunity of learning with certainty whether there is or is not ground for moving to set aside the indictment as having been found without evidence or upon illegal and incompetent testimony. The effect of denying to a defendant a copy of such minutes is to compel him in most cases either to forego the making of a motion to set aside an indictment upon the ground mentioned or to force him to predicate it upon unsatisfactory surmises. It is manifestly unjust to grant a motion to set aside an indictment on the ground mentioned where the moving party brings no sufficient proof of the fact to the attention of the court, and it is equally unjust to deny it where the failure to make such proof is due to inability to procure a copy of the minutes.

If the court is, therefore, not to take away from a defendant a substantial right, namely, the right to have an indictment set aside which is found without evidence or upon illegal and incompetent testimony, and is, on the other hand, not to encourage applications made upon mere surmise and unsustained by sufficient proof, it must accord

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to a defendant an opportunity to learn on what evidence an indictment has been found, which it can only do by giving a defendant an inspection of the grand jury minutes. Thus, in the case of People, etc. v. Steinhardt, 47 Misc. Rep. 252, the court, at page 262, comments upon the fact that the defendant is moving the court for an inspection of the minutes upon a surmise, and then refuses to allow the defendant to inspect the minutes, upon an inspection of which he could alone move with certainty to set aside the indictment.

Considerations of public policy constitute the third reason for the granting of an application like the present, under circumstances such as are presented by the motion papers. The granting of such applications, where otherwise proper, tends to promote care in the presentation of matters to a grand jury. Grand jurymen are laymen, oftentimes more or less hurried because of personal engagements, and at times, as a result, satisfied with less evidence, or evidence of a poorer character or quality than that required by law. As a result, it sometimes happens that, despite the utmost zeal and vigilance on the part of the district attorney, owing to haste in the grand jury room, which in itself is well meant, indictments are found upon insufficient evidence, or upon improper testimony.

The granting of an application like the present in a proper case, moreover, has a tendency to prevent false swearing before the grand jury. It tends to unearth private malice, if private malice leads to wrongful criminal prosecution, and exercises a restraining influence upon witnesses commensurate with that which they are under when a case is on trial before a trial jury. The granting of an application of this kind is no invasion upon the proper secrecy of grand jury proceedings. Historically, from early time, a distinction was made between the deliberations of the grand jury on the one hand and the reception of evidence by them on the other hand. The first, including their discussions and votes, was always required to be secret. The last, while generally secret, was sometimes public as well as secret. In early times, when the testimony was heard in public,

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it was heard in open court, and was as ascertainable by the accused as by the prosecution. When received in secret it was as hidden from the one as the other. Gradually, and mainly that the grand jury should not be coerced by governmental influences when such influences were conceived to be inimical to the liberties of the people, testimony was received by them in private. It was received without the presence in the grand jury room of the prosecutor for the crown, and later in this country generally without the presence of the district attorney. The first innovation was that which permitted the district attorney to be present at the taking of testimony. The next, the communication to the district attorney of the substance of the testimony in order that therefrom he might draw the form of indictment desired by the grand jury.

In 1885 provision was made for the taking of the testimony before the grand jury by a stenographer appointed in the county of New York by the district attorney, and this stenographer was required to furnish to the district attorney a copy of the minutes. This legislation resulted in more fully arming the district attorney at the threshold of the prosecution for its successful maintenance. If justice is to be done the tendency of the courts must be to enlarge the privileges of a defendant *pari passu* with the growth of the power of the district attorney.

Special reasons may exist in particular cases, founded upon public policy and the interests of justice, which should lead to the denial of a motion such as is made in the present case. In certain cases it may be proper for the district attorney to bring such reasons upon his official responsibility to the attention of the court, without necessarily disclosing them in open court; and where the court, upon investigation, has reason to believe that such reasons exist, the application should be denied.

The present is concededly not such a case. The district attorney has disclaimed in open court that any such reasons exist.

I have examined with care the interesting brief submitted by the district attorney in opposition to this motion, the in-

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structive brief which he used in the case of People v. Steinhardt, 47 Misc. Rep. 252, and the opinion of Mr. Justice Kenefick in that case. It is substantially upon that opinion that this motion is opposed. If I concurred in the reasoning of Judge Kenefick I should still feel constrained, for the reason stated, not to follow the Steinhardt case. I do not, however, concur in the reasoning in the Steinhardt case. The reasoning in the Steinhardt case, respecting the distinction to be drawn between a case where there has been a preliminary hearing and a case where there has been none, goes rather to the point that an inspection of the grand jury minutes should not be denied *simply because* there has been a preliminary hearing, and in this view I concur.

The motion should be granted, in harmony with the practice of this court, for the reasons advanced in the earlier decisions in this court and for the additional reasons mentioned in this opinion.

Motion granted.

Matter of the Estate of CHAUNCEY D. PACKARD, Deceased.

(Surrogate's Court, Rensselaer County, February, 1907.)

Executors and administrators — Collection of assets — Discovery and surrender of assets — Procedure — Dismissal.

The surrogate may examine a person who is alleged to have in her possession property belonging to the estate of a deceased person notwithstanding the person sought to be examined claims, in a verified answer to the petition, the ownership of the property involved in the application.

APPLICATION under section 2707, of the Code of Civil Procedure to examine a person regarding personal estate alleged to have been in possession of decedent.

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Harry P. Humphrey, and John B. Holmes, for the petitioners.

William J. Roche, for the respondent.

HEATON, S. This is an application under section 2707 to examine a person regarding personal estate alleged to have been received by and to have been in the possession of the deceased during the year previous to his death, and which personal property has not come to the hands of his executors and which, it is alleged, aggregated about $7,000 in value.

The person against whom the proceeding is brought was the housekeeper of the deceased who was a widower over eighty years old; and she alleges by verified answer that $4,000 of such money was given to her by the deceased about six months prior to his death as compensation, in addition to a provision in his will, for long and faithful service as such housekeeper. As to the existence or disposal of the other property, she alleges no positive knowledge, and asks that the proceeding be dismissed by virtue of section 2709 and because the facts as to the petitioners' rights to the property are in dispute, in which case it is provided by section 2710 that the proceeding shall end.

These sections of the Code have recently been considered in Matter of Gick, 49 Misc. Rep. 32; affd., 113 App. Div. 16.

It was there held that recent amendments to these sections had changed the rule that a verified answer claiming title to the property in question ousted the surrogate of jurisdiction, and that now the surrogate is vested with discretion in such a case to direct the examination to proceed, and to determine from such examination, and not from the answer, whether or not there is a *bona fide* claim of title to the property in question. It is the claim of title by the "witness" supported by the facts shown upon an examination which requires the dismissal of the proceeding, and not the allegations in the answer made by the "person cited."

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Misc.] Surrogate's Court, Kings County, February, 1907.

Executors and administrators are charged with the duty of getting possession of all the assets properly belonging to the estate of the deceased, and become personally liable if they fail to make all reasonable effort to that end. When they apply to the court for its assistance in performing the duty, the discretion of the surrogate should be exercised liberally in allowing them the most full and free examination into the facts regarding the claim of possession or title set up by a person alleged to have possession of property which the executors or administrators might reasonably expect to have come to them as assets of the estate. In the absence of the consent of the claimant to try the title to the property in Surrogate's Court, the result of the examination may not be the recovery of the property, but it will be a disclosure of the facts regarding such claim of title which will enable the executor or administrator to act intelligently in performing his duty of deciding whether or not to subject the estate to the expense of an action at law to recover the same.

Let the examination be had.

Application granted.

Matter of the Estate of EDWARD W. SENTELL, Deceased.

(Surrogate's Court, Kings County, February, 1907.)

Depositions — Depositions on commission — Order for commission — Open commission — When surrogate will vacate order granting.

Where, in a proceeding for the probate of a will involving the interests of an infant contestant, an open commission has been granted upon the application of the proponent to take the testimony of a foreign witness and the special guardian applies for an allowance from the estate to defray his expenses in attending the execution of the commission or employing counsel to represent him and the proponent opposes such allowance, the court, being without power to order the allowance, will vacate the order for an open commission and make an order providing for a commission to take the testimony upon written interrogatories.

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Surrogate's Court, Kings County, February, 1907. [Vol. 53.

PROCEEDING upon the probate of a will.

Edward H. Miller, for proponent.

Bernard J. McCleary, special guardian.

CHURCH, S. The question presented by this application is somewhat novel and arises by reason of the unusual facts of the case. The family of the deceased were killed in a railroad accident in England, and the deceased sustained injuries from which he expired in a few days in a public hospital there. During the interval between his injury and his death he made his will in which he gave all his property to his sister-in-law. Upon this will being offered for probate, a contest is set up by the half-brother, and the special guardian appointed for an infant nephew also files objections to its admission.

Application having been made to the court for an open commission to take testimony on this subject in England, the special guardian now asks the court for instructions as to what are his duties in the matter and, if it is deemed proper that he should go to England to take part in the hearings on this commission, that a suitable allowance be made to him for his necessary expenses in so doing. The proponent objects to any expenditures being made out of the estate for any such purpose, contending that there is no power in the court to allow them.

There is no specific provision of the Code covering this situation, nor does there seem to have arisen any case in which a similar question was presented for decision.

Notwithstanding this, however, there can be no doubt of the advisability of the court having the power to do what is reasonable and proper under such circumstances as exist here. Under the general theory of the law the court is expected to safeguard and protect the interests of infant litigants. To this end a special guardian is appointed to examine into the matter and to take such proceedings as may be necessary to preserve the infant's rights. That being so, it is perfectly manifest that, in such a case as this, in order

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to properly exercise the court's function of protecting the infant's rights, the special guardian should appear before this commission or be represented by foreign counsel. It goes without saying, of course, that either of these proceedings involves the expenditure of a substantial sum of money. If the court has not the power to make any allowance to the guardian to reimburse him for the expenses to which he is put, the theory of the law that the court has power to look after the interests of the infant is nullified and the appointment of a special guardian is made a farce.

Appreciating this fact, and with a natural desire to reduce as much as possible any contest that may be made to this will, the proponent strenuously opposes the allowance sought by the special guardian and cites several cases in which such limitations have been made. While these cases are not directly applicable, as the circumstances differ from this case, yet they clearly indicate what has already been shown, the lack of power in the court to make a general allowance to the guardian for special expenditures which are absolutely necessary to protect properly the interests of his ward.

As it is apparent, therefore, that the proponent is endeavoring to thwart the proper discharge of the guardian's duties, the order for the allowance of an open commission will be vacated and a closed commission will be issued, in which the special guardian will have full power to join without incurring the expenses of an open commission.

Let an order disposing of this question in accordance with this opinion be presented upon due notice to all the parties.

Decreed accordingly.

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Matter of the Probate of the Last Will and Testament of JUSTINA GAMBER, Deceased.

(Surrogate's Court, King County, February, 1907.)

Wills — The testamentary instrument or act — Execution of will — Evidence of execution — Publication and request.

Where a statement was made by the testatrix that the paper she was about to sign was intended to be her will and a request was addressed by her to the witnesses to sign as such, before she actually affixed her signature; but, as part of the same transaction, she immediately signed her name and passed the paper over to the witnesses who then signed their names, a sufficient declaration and request of the testatrix appears.

PROCEEDING upon the probate of a will.

Kramer, Cohn & Burby, for proponent.

James C. Cropsey, for contestant.

CHURCH, S. It appears here that the statement of the deceased that the paper offered for probate was intended to be her last will and testament and her request to the witnesses to sign it as such were made before she signed the instrument; and that, upon the witnesses assenting to her request, and without further conversation on the subject, she signed the paper and passed it over to them for their signature as witnesses. From all the circumstances in the case it is apparent that the matter was practically completed at one transaction and that, even if there was not a specific declaration by the deceased that this was her will after she had signed it, yet, coupled with her previous remarks, the fact that she signed it in the presence of the witnesses and passed the paper over to them for their signature amounted, in effect, to a request to them to sign as witnesses her last will and testament. I feel constrained, therefore, to admit the will to probate.

Let findings and decree be prepared accordingly.

Decreed accordingly.

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Misc.] Surrogate's Court, Kings County, February, 1907.

Matter of the Probate of the Last Will and Testament of MICHAEL MORAN, Deceased.

(Surrogate's Court, King County, February, 1907.)

Wills — Interpretation and construction — Ademption, revocation and satisfaction — Extinction and substitution of specific property; Satisfaction of legacies — Gifts in lifetime.

Where a testator gave his vessel property known as "Moran's Towing Line" to certain persons in certain proportions and soon after making his will organized a corporation named "Moran's Towing and Transportation Company," which took over such property, and the testator directed corporate stock to be issued in the names of such legatees, in varying amounts, held that the testator intended the corporate stock to pass under his will to the legatees named and that such amounts as had already been issued by his direction should be deemed advancements to the several legatees on account of their respective legacies.

PROCEEDING upon the probate of a will.

Peter S. Carter, for proponents.

Francis A. Crowe, special guardian for Moran infants.

CHURCH, S. The special guardian appointed on behalf of the infants asked for a construction of the will of the deceased.

After making several provisions in the will for certain special legatees, the testator recites that he desires to make a division of "my interest in the vessel property known as 'Moran's Towing Line.'" Then follows a provision as to the percentage which various legatees shall have in such property and a direction for the continuance of the business. No residuary clause whatever is contained in the will.

It appears that shortly after the drafting of the will the deceased had a company incorporated, known as "The Moran Towing and Transportation Company," to which he transferred all of his business which he had described in his will as "Moran's Towing Line." The question to be

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determined is whether this language in the will can be deemed effective as conveying the stock ownership of the deceased in such corporation or whether the legacies of the will have been adeemed and as to such stock the deceased is to be deemed to have died intestate.

The corporation which was thus formed by the deceased consisted of nothing but the towing business which was owned by him and by him described in his will. He was entitled to every share of its stock; but instead of taking it he directed the secretary of the corporation to issue it in various amounts to all the persons who are named as legatees in his will. Except for the fact of the existence of the corporate name, the business was carried on and managed in precisely the same manner as it had been conducted by the deceased prior to the organization of such corporation. The provisions of the will bear evidence of careful consideration and as being the results of a carefully devised scheme on the part of the testator to perpetuate such business; and the organization of it into a corporation was evidently in pursuance of a belief that it could be more readily managed in such form than if left in the hands of trustees or other persons subject to the control of the court.

It is hardly conceivable that, after having taken these pains, the deceased intended to die intestate as to all of this valuable property. He no doubt thought, and in my judgment thought correctly, that the description in his will of "Moran's Towing Line" sufficiently referred to the general character of the property without referring to the manner in which it was held.

One of the first considerations to be observed in the construction of a will is that such construction should be adopted as will avoid an intestacy. The conclusion that it was the intention of the testator to die intestate should not be indulged unless it becomes absolutely necessary.

The scheme of the testator can be carried out completely if it is held that the use of the words "the vessel property" applies to the stock ownership in the towing corporation; and, in considering the proportionate interest of the various legatees, the amount of stock which has been heretofore is-

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sued to them in the formation of such company shall be deemed as an advancement on their share.

Let a decree be entered, therefore, construing the will accordingly.

Decreed accordingly.

Matter of the Final Judicial Settlement of the Account of the Proceedings of JEREMIAH P. ROBINSON and ISAAC R. ROBINSON, as Executors of the Last Will and Testament of JEREMIAH P. ROBINSON, Deceased.

Matter of the Final Judicial Settlement of the Account of the Proceedings of JEREMIAH P. ROBINSON and ISAAC R. ROBINSON, as Executors of the Last Will and Testament of ELIZABETH ROBINSON, Deceased.

Surrogate's Court, Kings County, February, 1907.

Reference — Report and findings — Time for making report, etc.— Notice to terminate — Not applicable to references by surrogate.
Surrogates' Courts — Procedure and review — Referees, auditors and assistants — Termination of reference.
Code of Civil Procedure, § 1019.

The provision of section 1019 of the Code of Civil Procedure for the termination of a reference where the referee's report is not filed or delivered within sixty days from the time when the cause or matter is finally submitted does not apply to a reference by a surrogate to take proof and report under section 2546.

Section 1019 of the Code of Civil Procedure does not limit the time within which a referee has jurisdiction to act in the absence of an election by the parties or one or more of them to terminate the reference.

The time within which a referee is required to report may be extended and the provisions of section 1019 may be waived by the parties not only by formal stipulation but by such conduct as in fairness estops a man from taking advantage of the strict letter of the law.

A case is not to be deemed closed although the taking of testimony has been concluded while the referee, in good faith, at the request of any party, holds the reference open to enable such party to submit a thing that he deems material though the thing to be submitted may appear to be unnecessary and not controlling.

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MOTION to vacate and set aside a referee's report.

Owen & Sturges, for accounting executors.

Butler, Notman, Joline & Mynderse, for Central Trust Company, trustee.

J. Edwards Wyckoff, for Harriet W. R. Leach, individually and as executrix.

Grant Notman, special guardian for Leech infants.

Kenneson, Crain, Emley & Rubino, for Elizabeth De Witt Coombs, individually and as executrix.

J. Noble Emley, for William H. Coombs, trustee for Elizabeth De Witt Coombs.

Edward J. Mone, for Josephine B. Towle.

Milan Day Barnes, for William B. Leonard.

John B. Coleman, for Mabel R. Dumbell.

Perkins & Jackson, for Esther H. Underhill.

Charles H. Kelby, special guardian for John G. Underhill and Herman L. Underhill.

CHURCH, S. This is a motion to vacate and set aside a referee's report on the ground that, at the time it was made, more than sixty days had elapsed since the matter had been finally submitted to him, and the attorney for one of the parties had elected to terminate the reference in accordance with the provisions of section 1019 of the Code.

The order of reference in this case is dated January, 1903, and the reference has proceeded with many adjournments and delays since that time. The most complicated questions were considered and, if the opposition of the moving party is tenable, the entire four years' litigation goes for naught and will practically have to be gone over

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again from the beginning. It is not contended that all the evidence which it is possible to take on the issues involved has not been submitted, or that, upon any new hearing, any circumstances will be shown which will in any way affect the result reached. But the moving party stands upon the technical rights which he claims under section 1019 of the Code and asks for the strict enforcement of its provisions. While the subject is one in which the court has no discretion and, hence, if the moving party has made out the facts bringing the case within the provisions of the section quoted, it must impose the penalty therein provided, yet it is perfectly manifest that this section should be construed in the same manner as statutes of a similar character, that is, strictly; and, unless the case is clearly within the letter of the statute, the motion should be denied.

The record discloses that, from the time of the first session to the delivery of the final report, there was a series of hearings, rehearings, adjournments and delays — which are not unusual in referred matters.

The attorney for the moving party does not, by either of the two notices which he gave electing to end the reference, nor by his motion papers, disclose the time at which he contends the case was deemed finally submitted to the referee and from which the sixty days given to the referee by the Code should be reckoned. But a long affidavit which he submits, of so much of the proceedings as he deems to be important, lays the subject generally before the court. It becomes necessary, therefore, to recite briefly the order of events before the referee:

At the outset, it may be stated that, although eleven sets of attorneys, appearing for as many different parties, were concerned in the case, the main controversy seems to have narrowed down between counsel for the executors and Kenneson, Crain, Emley & Rubino, counsel for the Coombs interests, and Mr. Coleman, counsel for Mrs. Dumbel, the daughter of Mrs. Coombs, who had a remainder interest. In this connection it is, perhaps, proper to call attention to the fact that Coleman and Kenneson, Emley & Rubino had their offices in the same building and in close proximity,

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and that upon the reference Coleman acted for Kenneson, Emley & Rubino's clients and that the brief which they subsequently submitted was the joint brief of both, in fact that, almost at the inception of the reference, Mr. Kenneson stated to the referee and had placed on the record the fact that Mr. Coleman was to act as attorney for his clients. The impression was, therefore, given to the referee by these parties that any request made by either was to be deemed the request of both, and that any action taken by either was to be deemed the action of both.

The matter was submitted to the referee and, by virtue of various stipulations in writing, signed by all the parties, the time of the referee to report was duly extended to July 6, 1906. On the 30th day of June, 1906, the referee made and signed a report, which is the report offered for confirmation, and gave notice of the rendering of the same, together with a copy thereof, to all the attorneys.

The whole of the present controversy arose thereafter in consequence of what, in my opinion, is the mistaken belief of the attorneys with respect to the requirements of the Code in relation to the report. (The provisions of the Code which will show this mistake will be discussed hereafter.) It appears that the counsel for the executors and, also, counsel for Coombs were under the belief that it was imperative upon the referee to make and sign findings of fact and conclusions of law; and this belief was shared by the other parties, who, to protect their interests, thought it was necessary that there should be before the referee proposed findings and conclusions of law, to the refusal of the referee to find any of which they could take proper exception. And, while it does not appear that the referee definitely determined as to whether this contention was correct, yet it is evident that he yielded to the requests of the attorneys and permitted them to have an opportunity to submit the findings and did not file his report; and, accordingly, by several extensions, their time to submit was extended to August 8, 1906.

About the first of August, requests were made to him to further extend the time in which all parties could finally

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submit all papers in the controversy until October first. On August fourth, four days before the stipulation made by all the parties expired, the referee wrote a letter in which he stated that, if it was desired to have him pass upon the findings so that they might be filed with his report, it would be necessary for him to have a week after such findings were handed to him to file his report and said that, unless he heard from any of the attorneys to the contrary, he would assume that this arrangement was satisfactory. The receipt of this letter by Coleman, counsel for the moving party, is conceded; and it is also conceded that he did not object thereto or make any request to the referee to shorten the time asked for by the other attorneys. Now, as the parties who were most solicitous for an opportunity to submit proposed findings of fact and conclusions of law were the firm of Kenneson, Emley & Rubino, his colaborers, it may be deemed that the request for an adjournment had practically come from the moving party. At this time it is apparent the referee was anxious to report and end the matter, and that it was only in consequence of the importunities of these attorneys that he did not do so.

At the time he wrote the letter referred to — on August 4, 1906 — he delivered his report to the counsel for the executors with the statement that, as the parties had asked for an adjournment until October to file their requests, the report should not be filed until then, so as to give them the opportunity to comply, but that he deemed it advisable, as a means of protection (apparently in view of the new delay), to make delivery of the report. On September twenty-fourth, the referee wrote to the attorneys calling attention to the delays that had occurred and stating that he would like to dispose of the reference and trusted that they would shortly arrange that the same be settled. Upon requests from Kenneson, Emley & Rubino for further time to submit their proposed findings, the time was extended to October eighteenth. At this period it was not disclosed to the referee, nor was it apparent in any way in the proceedings, that there had been any severance in the relations between Coleman and Kenneson, Emley & Rubino; but the condi-

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tion which existed at the commencement of the case, that each represented the other, was apparently still continuing.

On October fifteenth, the referee again wrote to Kenneson, Emley & Rubino, soliciting them to file their requests, as he was desirous of delivering his report. The following day, Owen & Sturgis, counsel for the executors, duly filed their requests to find, and Kenneson, Emley & Rubino wrote to the referee acknowledging the receipt of his letter of the previous day and stating that negotiations were in progress for the settlement of the controversy and asking further time to file requests; the time was accordingly extended to October twenty-fifth. On October twenty-third a further letter was sent by Kenneson, Emley & Rubino to the referee, stating that the negotiations for settlement were still pending and again soliciting an extension until November seventh.

Further oral representations were made to the referee that these negotiations were still in progress and further requests made for more time. While the matter was in this state, Mr. Coleman, on behalf of his client, Mrs. Dumbel, served a notice on November thirteenth that he elected to terminate the reference. This action of Coleman, in electing to terminate the reference on the ground of alleged delay, when the only delay was due to the importunities of the attorneys of record for the parties whose interests he himself also represented, was manifestly a surprise to all parties. The referee immediately gave notice to all the parties that they were required, within two days from the receipt of the same, to file their requests to find, after which time no further appeals for extensions would be granted. A representative of Kenneson, Emley & Rubino called upon the referee and disclaimed any part in the conduct of Coleman and explained that it was evidently prompted by some friction between Coleman and his firm.

At this time Emley had his requests to find, which he delivered to the referee; but he also solicited the latter to withhold the filing of his report, as, notwithstanding the action of Coleman, the negotiations for a settlement were still in progress and he believed there was still a prospect

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of their success. To these requests the referee consented; and, on November twenty-second, Kenneson, Emley & Rubino gave to the parties notice of motion for a reargument of the case before the referee on November thirtieth. On November twenty-third a stipulation was filed with the referee that the time to file findings of fact and conclusions of law should be extended to December fourth. This stipulation, however, contained the provision that it was without prejudice to the rights of any party. On November thirtieth, the motion for a reargument was adjourned until December tenth, and, on December fourth, a stipulation extending the time to file findings until December eleventh, which was in exactly the same form as the one of November twenty-third, was made. On December tenth a hearing was had upon the notice of motion given by Kenneson, Emley & Rubino. At the inception of this hearing, Coleman objected to the same "on the ground that the referee has no jurisdiction." For what reason he claimed that the referee had no jurisdiction is not disclosed, nor does it appear in his motion papers. This objection was overruled, a reargument was had and, at the conclusion of it, the referee asked if there was any reason why he should not then file his report. Accordingly, he filed his report on December fifteenth, together with findings and proposed findings of the various parties, and gave notice to all that he had done so. His report was dated December twelfth; but, on December fourteenth, Coleman served another notice stating that he elected to end the reference, on the ground that the referee had failed to report within the time allowed by law.

There does not seem to be any dispute as to the correctness of these facts. The difference and divergence which have arisen grow out of the varying contentions as to their effect and as to the legal questions involved.

At the outset of the discussion of the law affecting the matter, it is important that we carefully consider the provisions of the Code covering this subject. These are to be found under title 2, chapter X. In the Supreme Court a referee may be appointed to hear and determine, in which case he has all the powers of a judge, and upon his decision

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judgment is entered with like effect as if it were the decision of a judge, and an appeal is taken directly to the Appellate Division. By section 1023 it is provided that, upon a trial before a judge or referee, the attorneys for the parties must submit in writing proposed findings of fact. upon which the court or referee must note whether he has found or refused to find the same, before the rendering of his decision or report. Section 1015 of the Code provides that the court may, wherever it is necessary for its information, order the referee to take proof and report to the court his opinion thereon. It is manifest, therefore, that the provisions of section 1023 with relation to findings do not apply to a reference which is merely to take proof and report, as provided in section 1015. Matter of Sprathoff, 50 Misc. Rep. 109; affd., 112 App. Div. 918.

But the order of reference in this case was not made under any of the provisions of title 2, chapter X, but came within the provisions of section 2546 of the Code, which permit a surrogate to refer certain matters to take proof and report. That being so, an inspection of section 1019 discloses that it was not intended to apply to a reference in the Surrogate's Court and, therefore, that the entire basis upon which the moving party has acted is wanting. Section 1019 provides that, upon the trial by a referee of an issue of fact or law (which is manifestly the reference to hear and determine referred to in sections 1011–1014) and also upon a reference in pursuance of section 1015, the report must be delivered within sixty days. If it was intended to have the provisions of this section apply to a reference under section 2546 it is apparent that the Legislature would have said so; and, this being a section subject to strict construction, it cannot be extended by implication.

In none of the cases which I have been able to find from a diligent examination of the reports, was it ever attempted to have the provisions of section 1019 apply to a reference emanating from the Surrogate's Court. On the contrary, in somewhat similar references it was distinctly held that the provisions of section 1019 did not apply. In Matter of Bennett, 21 Abb. N. C. 238, it was expressly held that a

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reference to take proof of the amount of the compensation due an attorney did not come within section 1019 of the Code. This adjudication was followed in Doyle v. Mayor, 26 Misc. Rep. 61, and in Bennett v. Pitman, 48 Hun, 612. In Godding v. Porter, 17 Abb. Pr. 374, it was held that "the section of the Code requiring referees to report within sixty days does not apply to a case of a reference under the approval of the surrogate."

This is sufficient to deny the motion but, in view of the importance of the proposition to the various parties, it seems desirable that every phase of this branch of the situation should be taken up and disposed of.

Mr. Coleman's contention, in which he is joined in the argument of this motion by Mr. Kenneson, is that, if the time within which the cause shall be finally submitted has been fixed, the referee has no power, upon the request of any of the parties, to extend the same; and that, if he does so, even if he exhibits perfect good faith, his jurisdiction is lost and the motion to elect to end the reference should be granted. Beyond his mere assertion that this is the law, he quotes no authority to sustain him; nor does he show any reason for placing such a construction upon section 1019 of the Code. None of the following cases, which seem to be the important ones bearing on this subject, sustains the contention. Parker v. Baxter, 19 Hun, 410; Gregory v. Cryder, 10 Abb. Pr. (N. S.) 289; Gill v. Clark, 31 Misc. Rep. 337; Dwyer v. Hoffman, 39 Hun, 360; Patterson v. Knapp, 83 id. 492; Morrow v. McMahon, 71 App. Div. 171; Tallmadge v. Lounsbury, 59 N. Y. Super. Ct. 132; Morrison v. Lawrence, 2 How. Pr. (N. S.) 72; Bennett v. Pitman, 48 Hun, 612; Godding v. Porter, 17 Abb. Pr. 374; Doyle v. Mayor, 26 Misc. Rep. 61; Little v. Lynch, 99 N. Y. 112; Ballou v. Parsons, 52 Hun, 164; affd., 55 N. Y. 673; Foster v. Bryan, 16 Abb. Pr. 396; Richards v. Bloom, 5 Hun, 182; Thiesselin v. Rossett, 3 Abb. Pr. (N. S.) 54.

On the contrary, from the reading of many of them, it is apparent that the direct opposite is the case. From a general examination of these cases the following principles may be deduced as covering the situation in hand:

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That the statute should be strictly construed was determined in Bennett v. Pitman, 48 Hun, 612, in which the General Term said "the provisions of the section are stringent and should be carefully limited to the cases expressly mentioned therein." In Gregory v. Cryder, 10 Abb. Pr. (N. S.) 296, it was held that "the jurisdiction of the referee ceased by the service of the notice. The order referring and all subsequent proceedings are a mere nullity, the same as if not existing. * * *. The statute is plain in its requirements and the duty of the court is fairly to apply and carry it into effect." To the same effect are Morrow v. McMahon, 71 App. Div. 171; Little v. Lynch, 99 N. Y. 112, and Geib v. Topping, 83 id. 46.

The provisions of the Code in question do not prevent the referee from acting after the expiration of the sixty days, and his report is good unless there has been a delay of sixty days and some one of the parties has made the election under the section. If the party has not done so, he cannot object to the confirmation of the report or move to set it aside because made subsequently to the time allowed by the Code. In People v. Holly, 20 Wend. 481, the court said, "it is not a condition precedent to its validity that their report be made within sixty days." In Foster v. Bryan, 16 Abb. Pr. 396, it was held that "there is no limitation imposed upon the power of the referee to make a valid report, although more than sixty days have elapsed, unless one of the parties has taken some step manifesting an intention to proceed as if no reference had been ordered."

A referee has power, upon the application of any party, to enlarge the time within which the case shall be finally submitted. Morrison v. Lawrence, 2 How. Pr. (N. S.) 72. "The referee has power to enlarge the time for the submission of briefs, as he would have the power to postpone the argument of the case beyond the day fixed, if the case was to be submitted on oral argument."

The report provided by section 1019 of the Code means a simple report of the referee's decision. Hence, if, in the case of a referee appointed to hear and determine, whose duty it is to file findings of fact and conclusions of law, a

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report informal in form be submitted within the sixty days, he has complied with the section. Tallmadge v. Lounsbury, 59 N. Y. Super. Ct. 131. "Plaintiffs take the ground that the document filed by the referee was not a report within the meaning of the Code. Although it is the case that the document contained no findings of fact, as required by the Code, this omission did not prevent the document having the character of a report, even if such report be extremely imperfect and an insufficient foundation of a judgment. * * *. The referee had made, within the intent of section 1019, his report within the sixty days, and having made it, such as it was, the plaintiff was not entitled to end the reference."

The time of the referee to report, in addition to being extended by formal stipulation, is deemed extended by such conduct of the parties as in fairness should estop the litigant from taking advantage of the strict letter of the law. In Dwyer v. Hoffman, 39 Hun, 360, the motion to vacate was denied, "although the sixty days allowed by section 1019 had expired, upon the ground that the delay was caused by the defendant's propositions and attempts to accomplish a settlement, and it would be unjust to allow him to take advantage of his own acts; such a state of facts withdrew the omission to take up or file the report from the operation of the statute. * * *. It would be unfair where the delay is occasioned by the unsuccessful party and for his benefit to permit him to avail himself of an advantage thus gained and his acts should be declared in effect a consent for the enlargement of the time within which the report should be made."

In Gill v. Clark, 31 Misc. Rep. 337, the court said: "It is unquestionably true that section 1019 was enacted for the benefit of parties to litigation, and may be waived by them. This may be done not only by formal stipulation, but by such conduct as in fairness estops the litigant from taking advantage of the strict letter of the law."

Parties may agree orally, in the presence of the referee, that he shall file his report at an indefinite time; and, if one of the parties desires to terminate the reference, he

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cannot do so abruptly by service of a notice of election. Ballou v. Parsons, 67 Barb. 19. "The fairer and better rule would be, as it seems to me, to require, in such case, a notice to the party and referee, one or both, that, unless the report is made and delivered within a reasonable time, to be specified, say ten or twenty days, the reference will be deemed ended. This would render definite what was before left by stipulation indefinite. This rule is in conformity also with that applied to all agreements when the performance is left indefinite, and it is just in its application." Affirmed, 55 N. Y. 673.

In the face of the law, as outlined by the foregoing decisions, there can be no question that the delivery of the report on August fourth to the attorney for the executors was a compliance with the section of the Code referred to; and, as that was within the time which by express stipulation the referee had to decide the case, the mere fact that subsequently there was some further discussion in relation to findings and a redelivery of the report to the referee did not give to any of the parties the right to terminate the reference. All that the Code requires is that the referee shall either file with the court or deliver to the attorney his report. If the attorney, or the various attorneys, after that is done, try to get the referee to take the report or to do any other act, while they may make such act the basis of a motion asking the court to intervene, yet such a situation is not covered by the provisions of section 1019; as the sole right given to the party by that section is based upon the failure of the referee to make a report, and no mention is made as to what shall be done in the event of the referee or the parties desiring to change or modify such report.

As I have heretofore shown, by referring to the sections of the Code in question, this report was complete and perfect and, in any circumstances, under the doctrine of Tallmadge v. Lounsbury, was sufficient to take the case out of their provisions.

This establishes, therefore, a second reason for the denial of the motion. But, passing the same and taking up the subsequent events, we necessarily have presented to us the

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question as to when, under the statute, the case is to be deemed finally submitted, and when, under the facts in this case, the matter was so finally submitted. Upon this subject it seems to me that the Code and the foregoing decisions determine that, upon the conclusion of the taking of testimony if the referee in good faith, upon the application of any party, is willing to hold the reference open to permit such party to submit anything deemed necessary by such party, then the case is not yet finally submitted. It is not a question of whether the papers to be submitted are sufficient to the controversy. It is not whether at this time they are to be regarded as matters which are controlling, but the sole question is, was there in good faith an extension of time by the referee to submit papers given in pursuance of a request which was also made in good faith?

It is a matter of experience that zealous attorneys may want to submit matters which, to a person separated from the interest which they have in the litigation, may appear unnecessary. It is immaterial whether such papers to be submitted are exhibits, briefs or findings, provided they are pertinent to the controversy, if the request is made in good faith and the action of the referee in giving the party time is made in good faith. As there is nothing in the entire record which shows that the requests for time to submit briefs were not made in good faith, and as there is nothing showing that the referee's action thereon was otherwise than in perfect good faith and with a desire to be courteous and to conserve the rights of the litigants, the decision of this matter becomes a very simple one.

In determining the time at which the case was finally submitted, we will take up, first, the conditions which preceded and which existed on November thirteenth, the day of the first notice of election to terminate the reference.

The referee's letter of August fourth — in which he stated that an application had been made to extend the time for the submission of findings until the first of October, and that if this was granted he would need a week thereafter, and further saying that, in the absence of objection, he would assume that this was consented to — not being resisted or

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controverted in any way, unquestionably operated as an extension of the time to the seventh of October. And by oral requests this time was evidently further extended until October fifteenth. In pursuance of an application by letter, the referee extended the time to October twenty-third and, by subsequent letter, to November seventh. From these letters it is apparent that, although the extension was obtained for the ostensible purpose of enabling the parties to submit their findings, in fact the extension was asked for in consequence of the negotiations for settlement which were pending between all of the parties. Thus, even if in this way the time to submit had by accident passed, yet the case is brought squarely within the doctrine of Dwyer v. Hoffman and Gill v. Clark, *supra*.

The power of the referee to thus extend, upon the application of a party in good faith, is within the decision of Morrison v. Lawrence, *supra*.

On November seventh, and shortly thereafter, there were further oral requests for time and statements that the matter was in negotiation. Even, therefore, if November seventh be regarded as the last day for parties to submit findings and until which the referee had given them to submit findings, his time to pass thereupon and make his report ran for sixty days from that time, namely, until January seventh; and hence the notice of election given by Mr. Coleman on November thirteenth lacked the basis of the neglect of the referee to make a report within sixty days after the matter was finally submitted, because, in the face of the requests of the parties, it cannot be said that this matter could be deemed to have been finally submitted previous to November seventh.

That this condition of affairs arose in consequence of the delay of the parties to get the papers which they desired to have passed upon before the referee into his hands, and not a neglect of his to pass upon any matter which was before him, is further confirmed by his notice of November thirteenth, in which he requires all parties to submit their findings within two days under penalty of his refusing them further time. In pursuance of this notice, Kenneson, Emley

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& Rubino submitted their findings, and some of the other parties asked for additional time to do so. On November nineteenth, Kenneson, Emley & Rubino had the referee give notice that, on November thirtieth, there would be a reargument of the matter; and, a few days later, the stipulation of November twenty-third was made extending the time to December fourth. It is the contention of the moving party that this stipulation by virtue of its being stated to be "without prejudice" did not operate to extend the time within which the case should be submitted. I am unable to accept this interpretation. Any such construction would be an absurdity because it would in effect be saying that "the time is hereby extended to December fourth and that such time is not extended." My theory of the effect of the notice is that it sufficed to extend the time to December fourth and that the statement that it was "without prejudice" meant without prejudice to any of the rights of the parties except the one of opposing the extension of time. That being so, even if the notice of November thirteenth to elect to end the reference was properly given, the rights under it were waived by the consent of November twenty-third. Upon November thirtieth, the time of the hearing of the motion for a reargument was adjourned to December tenth; and, in pursuance thereof, the stipulation of December fourth was entered into by which the time to finally file papers should be extended to December eleventh. And, of course, I give the same effect to this stipulation as to the one of November twenty-third, both being in the same terms. Therefore, by express stipulation in this case, the time within which the same was to be finally submitted was extended until December eleventh.

On December tenth the parties appeared for the purpose of the reargument. Coleman, on behalf of his client, contended that the referee had no jurisdiction. Kenneson, on behalf of his client, however, desired to be heard and evidently reargued the matter at some length. The fact that none of these delays were delays of the referee in making his report, but were due to the parties not getting the matter into final shape before the referee for report, is shown by

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his query, at the hearing of December tenth, if there were any reasons then in existence why he should not file his report. Accordingly, the referee, within two days, on December twelfth, signed his report and, on December fifteenth, filed it, together with all the findings. As the case was not finally and conclusively submitted to him until December tenth, he had sixty days from that time in which to report; but, as stated, he signed his report and passed upon the findings within two days.

There was no ground, therefore, on December fourteenth, which authorized Mr. Coleman to elect to end the reference, and his notice is insufficient. The report which the referee filed is the report which he had made on June thirtieth, except that he changed the date thereof in consequence of the request of the parties that the findings might be submitted before the making of such report.

This is not the case of a slothful and dilatory referee, but rather the case of a referee desirous of giving the parties every opportunity to settle or submit anything that in their judgment was material to their side of the case; and, instead of being commended for his conduct, it is made the basis for a charge of misconduct by the attorneys whom he was endeavoring to accommodate. The language of Judge Barrett, in Dwyer v. Hoffman, *supra,* is very pertinent in this connection: "I am satisfied that the plaintiff's attorney was misled, and that the delay in taking up the report was really to accommodate the defendant and substantially at his request and for his purposes. To deprive the plaintiff of the benefit of the entire litigation, merely because he good naturedly gave defendant time to arrange some kind of a settlement, would be not only an injustice but, in my judgment, a very narrow, strained and technical view of a statute which was simply intended to compel prompt and industrious attention to the case upon the referee's part."

Motion denied, with twenty-five dollars costs.

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Matter of the Judicial Settlement of the Accounts of WILLIAM J. ROCHE, as Executor of the Last Will and Testament of HENRY T. NASON, Deceased.

(Surrogate's Court, Rensselaer County, February, 1907.)

Trusts: Nature and elements in general — Gift to corporation for corporate purposes does not constitute a trust; The trustee, appointment, etc.— Beneficiary as trustee.

Corporations — Incorporation and organization — Contents of articles.

Where a testator gives to an incorporated hospital a sum of money, to be used, while said corporation maintains a hospital in Troy, for maintaining a room for the use of persons to be admitted in a certain manner, two churches of said city having respectively the first and second right to select those who shall occupy it, and with the provision that the corporation shall before receiving the fund execute an agreement to administer the fund as required by the will of the testator; and where the intention and purposes of the testator are all within the corporate powers of the corporation, whose board of directors is competent to make rules and regulations to carry out the details of the testator's expressed wishes, held, that it was the intention of the testator to make an absolute gift to the corporation for the purpose of its incorporation, not limited to the period during which it might maintain a hospital in Troy, the income to be used for a certain length of time in a particular manner.

The certificate of incorporation of a hospital association is not invalidated by reason of a statement therein that the object of the corporation shall be erecting, establishing and maintaining a hospital *and dispensary* nor because it specifies an intention to receive persons who wish to pay for treatment.

MOTION by the next of kin to intervene in a proceeding for the judicial settlement of the account of an executor.

Edward W. Douglas, for executor.

William J. Roche, executor in person.

William H. Van Schoonhoven (Van Santvoord & Wellington, of counsel), for Samaritan Hospital.

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Henry J. Speck, for executor of will of Dr. E. D. Ferguson, deceased.

Patterson, Bulkeley & Van Kirk, for Isabella K. Lombard.

Justin Kellogg, in person.

Van Santvoord & Wellington, for Troy Public Library.

J. K. Long, for next of kin.

HEATON, S. The will of the deceased upon its face disposes of the whole estate and, therefore, the heirs-at-law and next of kin of the deceased have not been cited upon this accounting. Two of the next of kin, Susan A. Dearborn and Eliza E. Bates, appear by their attorney and ask to be made parties to this proceeding, alleging that they are interested in the estate by reason of the fact that the bequest of $10,000 to the Samaritan Hospital of Troy is invalid and if invalid does not fall into the residuary estate; upon the further ground that the Samaritan Hospital, as the residuary legatee in said will named, is not a legal corporation, and, therefore, the gift of the residuary estate to it, as well as the bequest of $10,000 to it, is void and that such bequests go by operation of law to the next of kin of the deceased. The executors, the Samaritan Hospital and other legatees filed answers to the petition of the said next of kin; and, upon the issues thus raised, a hearing was had to determine the rights of the petitioners to be made parties to the judicial settlement. There were introduced in evidence the will of the deceased, the agreement of the Samaritan Hospital with the executor of the estate, dated January 30, 1905, which was made in accordance with the requirements of paragraph No. 4 of the will and the certificate of incorporation of the Samaritan Hospital.

The will of Henry T. Nason provides as follows:

"*First.* I hereby make the following gifts, devises and bequests to the following persons and institutions * * * the Samaritan Hospital of Troy, N. Y., an institution incorporated under the laws of the State of New York, the

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sum of ten thousand dollars for the purposes hereinafter described * * *.

"*Fourth.* The said gift or bequest to the Samaritan Hospital is to constitute an endowment fund to be used while the said corporation shall maintain an hospital institution in Troy for the purpose of endowing and maintaining a room in the said hospital, which fund shall be known as the Nason free bed fund, and which room shall be known as the Nason room, wherein worthy poor persons may, in case of sickness or accident, receive treatment, nursing, food and attendance free of charge. The religious corporation known as the First Presbyterian Church of the City of Troy, acting through its officers or societies who care for the sick and poor, shall have the first right and privilege to have such room occupied by and such care and treatment given therein to any poor sick or injured person whom such religious corporation may from time to time select and send to such hospital; and, in the event that said religious corporation shall at any time be not using such room for such purpose, then the religious corporation known as the Second Street Presbyterian Church, whose place of worship is on Second Street in the City of Troy, shall have the like right and privilege. The said sum of ten thousand dollars shall be paid to the said hospital corporation within two years after my decease without interest; provided, however, that the said corporation shall execute in writing and deliver to my executor an agreement that said hospital corporation will accept said sum as an endowment fund and will invest the principal and that the said room shall be maintained out of the income of such investment and that it shall be used in the manner and for the purposes above set forth while an hospital institution is maintained by said corporation in the city of Troy, and that said religious corporations shall have the rights and privileges above set forth; failing the execution of such an agreement, the gift to such institution shall lapse.

"*Fifth.* In case neither my said mother nor my said grandfather shall survive me, then the following gifts, devises and bequests are hereby made and are substituted in

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place of those contained in the preceding item and they shall be paid to the following persons and institution to-wit * * * to the Samaritan Hospital of Troy, N. Y., the sum of ten thousand dollars for an endowment fund for the purpose of maintaining a free room and bed to be known and used as set forth in the fourth item of this will and to be invested and the income applied as set forth in said item * * * and all the rest, residue and remainder of my said estate and property to the said Samaritan Hospital in Troy, N. Y.

"The gift of ten thousand dollars to the Samaritan Hospital made in this item must be accepted subject to the conditions mentioned in the like gift to it in the fourth item of this will.

"*Sixth.* It is my desire that all my estate shall be converted into personal property and shall be paid out and distributed as such in case my mother shall not survive me and, for the purpose of making such conversion, I hereby authorize and direct my executor hereinafter named * * * to sell and convey any and all real estate of which I may be the owner at the time of my death and execute and deliver sufficient instruments and deeds of conveyance thereof."

The force and effect of the objections raised to the validity of the bequest of $10,000 to the Samaritan Hospital depends upon the true construction to be given to the language employed by the testator and to the scheme devised by him for the disposition of this portion of his property.

The bequest of $10,000 to the Samaritan Hospital in the third clause of the will is included with many other bequests which are given directly and absolutely to the persons named and the language employed is that which expresses an intention to make direct and absolute gifts, viz.: "I hereby make the following gifts, devises and bequests to the following persons and institutions." The fourth item states that the said gift and bequest to the Samaritan Hospital is to constitute an endowment fund to be used, while said corporation shall maintain an hospital institution in Troy, for the purpose of endowing and maintaining a room; and then follows the general outline of a

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plan for the use of said income in accordance with the wishes of the testator and, it will be noted, strictly within the line of the expressed object of the institution. Referring to the certificate of incorporation of the Samaritan Hospital, we find it therein stated that the treatment of persons in such hospital and the admission of persons to such hospital shall be governed by the rules and regulations established by its board of directors. The intention and purpose of the testator plainly appears to be this: He gives $10,000 unreservedly to the corporation as an endowment fund to be used for a special purpose, which he in a general way outlines, such purpose being one of the very objects of the corporation. He requires the board of directors to make the necessary rules and regulations to carry into effect his plan and design, as they are clearly authorized to do by their certificate and the law. He further provides that the gift shall not be paid to the said corporation until it has prepared itself to execute the wishes of the testator and until it manifests such ability and willingness by the execution of an agreement to accept such endowment upon the terms and conditions specified in the will.

The corporation may refuse to accept the gift upon the conditions specified; but, having once accepted it, the gift is absolute and unconditional and not upon any trust expressed or implied. The ownership of the fund is in no way suspended. It becomes the absolute property of the corporation. No forfeiture is provided for in case the corporation fails to keep its agreement. The only condition made is that the corporation shall manifest its acceptance of the legacy by the execution of an agreement. Having executed the agreement, the bequest of the fund becomes absolute and unconditional. The words, "while an hospital institution is maintained by said corporation in the City of Troy," in no way apply to the gift of the principal of the fund, nor do they qualify or limit the absolute bequest thereof to the corporation. They apply, if at all, to the establishment of the Nason room, provided it ever transfers its hospital to some other place than the city of Troy or ceases in any place to maintain an hospital. Such expression

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affirms, rather than disaffirms, the intention of the testator to make the gift of the fund absolute to the corporation. It may have the property but need not maintain the Nason room when it ceases to be an hospital in the city of Troy.

Under this construction of the will, the bequest is an unconditional, perpetual gift to the hospital for its general purposes, the income to be used for a certain length of time in a particular manner. It leaves no ultimate reservation to the next of kin, nor does it suspend the period of absolute ownership. It is not a mere custodian of the income to be used as two other corporations shall direct, but to be used in accordance with the rules and regulations of its own board of directors. There is no trust either in the hospital, or the two church corporations, or the executor. It is not subject to forfeiture for breach of condition, and the executor is given no right in case of failure to perform the contract to do any act for the benefit of the next of kin.

Having outlined the intention of the testator, it remains to be seen whether said intention is opposed by any legal principle, and, therefore, cannot be declared valid.

In Bird v. Merklee, 144 N. Y. 544, the court said: "Gifts to religious and charitable corporations to aid in carrying out the purposes for which they are organized, whether by expending the principal of a bequest, or the income of a bequest to be invested in perpetuity do not create a trust in any legal sense, do not offend against the statute of perpetuities, are not to be judged by any of the well known rules pertaining to the law of trusts as applied to private individuals."

In Wetmore v. Parker, 52 N. Y. 458, the court said: "A corporation created for charity, etc., may take and hold personal property, limited by the donor to any of the corporate uses of the donee; and a direction of the donor that the principal shall be kept inviolate, and the income only expended, will not invalidate the gift; provided, of course, that the same is immediate and vested. The question relates to the capacity of the corporation; and the law of perpetuities has nothing to do with it. * * * The income only of the permanent endowment of such institution can be used with

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safety to its very existence. Any other course would frustrate, and, sooner or later, destroy its usefulness. * * *. It does not create a trust in any such sense, as that term is applied to property. The corporation uses the property, in accordance with the law of its creation, for its own purposes; and the dictation of the manner of its use, within the law by the donor, does not affect its ownership or make it a trustee."

The fact that a legatee is requested or required to make an agreement regulating the application of the income, received from personal property transferred to it, does not violate the statutory rule forbidding the suspension of the absolute ownership of personal property, and such agreement may provide that beneficiaries of the income may be selected by others than the corporation holding the fund, if such application of income is within the legal activities of such corporation. Tabernacle Baptist Church v. Fifth Avenue Baptist Church, 60 App. Div. 327; affd., 172 N. Y. 598.

The vesting of the legacy is not suspended until a point of time is reached when it shall be absolutely certain that the legatee will not fail to perform the condition, but vests absolutely and immediately upon the legatee's acceptance of the legacy upon the condition named, without regard to its subsequent compliance with such condition. Matter of Hart, 61 App. Div. 587; affd., 168 N. Y. 640.

Since the intention and design of the testator was to establish an endowment fund and direct the application of the income thereof along the general lines of the work which said corporation was authorized to carry on, these and many other decisions establish that there is no legal objection to the corporation executing the intention of the testator.

The gift of $10,000 is, therefore, a valid, absolute, unconditional bequest of the principal of the fund to the Samaritan Hospital, and there is no condition attached to it which said hospital has not the legal right to execute and perform; and such hospital, having executed the agreement required by the testator, is entitled to be paid, if it has legal capacity to take the bequest.

It is urged by the petitioners that the Samaritan Hospi-

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tal is not a legal corporation, and, therefore, the said bequest and the bequest of the residuary estate to it are void. This issue makes it necessary for the surrogate to determine whether or not the Samaritan Hospital filed a proper certificate to become a legal corporation; for, if it did not become a legal corporation, the legacies to it are void and the next of kin are consequently interested parties on this judicial settlement. The jurisdiction of the surrogate to determine such question is sustained by Matter of Arden, 20 N. Y. St. Repr. 865; Carpenter v. Historical Society, 2 Dem. 574; Smith v. Havens' Relief Fund Society, 44 Misc. Rep. 594, and by many other decisions which lay down the rule that, where it becomes necessary for the surrogate in the performance of his legal duty to do any act, he has jurisdiction to decide the questions arising which are necessary to be determined to enable him to fully and properly perform such duty.

A voluntary association for charitable purposes cannot, under the law of this State, take a legacy. Fralick v. Lyford, 107 App. Div. 543, which overrules Matter of Fitzsimmons, 29 Misc. Rep. 731.

The certificate of incorporation of the Samaritan Hospital contained all the statements required by law to be contained in such a certificate and was approved by a justice of the Supreme Court and by the State Board of Charities. If it contained more than it was required to contain, it was not on that account a void certificate. "Persons seeking to form a corporation under any general law must have a reasonable latitude as to what they may insert in their certificate of incorporation. They must insert therein all the matter particularly required by the law, and they may insert other provisions not inconsistent with law or public policy which are germane to the purposes of the corporation, and necessary, convenient or appropriate to the accomplishment of such purpose. If they keep within such limits the public authorities have no reason to interfere, the interests of the public are not jeopardized, and the right of no citizen violated." People ex rel. Fairchild v. Preston, 140 N. Y. 552.

The point is strongly urged that in the certificate this

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statement is made: "First the object of said corporation shall be the erecting, establishing and maintaining of an hospital *and dispensary* in the City of Troy;" and it is alleged that the law does not permit the organization of a corporation for more than one of the purposes specified in the Membership Corporation Law, section 80. It will be noticed, however, that the corporation which is formed by the certificate is stated to be an hospital corporation and not an hospital and dispensary corporation, and, therefore, under the foregoing cases, it is clear that, if it was improper to state, in defining the object of the hospital corporation, that it intended to maintain a dispensary as well as an hospital, that part of the certificate would not invalidate it.

"Merely because, the declared purposes are very broad in their scope and in practice a bit indefinite does not affect the validity of the incorporation as such." Smith v. Havens' Relief Fund Association, 44 Misc. Rep. 594.

It is also claimed that, in stating the object of said corporation, it is specified that persons may be received who wish to pay for treatment and that, for such reason, the institution was not entitled to be incorporated under chapter 559 of the Laws of 1895. This objection is untenable under the decisions above quoted and under the decision in Matter of Vassar, 127 N. Y. 1–14, where the court said that the charter of a charitable corporation (an old men's home) was not invalidated by charging an entrance fee, since where the object and purposes are charitable such a charge possesses no element of private or corporate gain.

It is, therefore, apparent that, so far as the surrogate has jurisdiction to decide, the Samaritan Hospital is a corporation entitled to take a bequest, and, therefore, the two bequests to it are not void.

It, therefore, appears that the testator has legally disposed of all his estate and there is nothing upon this accounting which can be distributed to his next of kin; and, for such reason, they are not parties interested in this judicial settlement, and their petition to be allowed to intervene is denied.

Motion denied.

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Matter of the Estate of CYRUS D. HIBBARD, Deceased.

(Surrogate's Court, Madison County, February, 1907.)

Wills — Interpretation and construction — Terms creating legacies and gifts of income, interest, support, etc. — Particular words of doubtful meaning — Directions to use principal if necessary for support.

Where a testator gave to his wife "the entire use of my real and personal property of whatever name and nature during her life, to draw on principal for her necessary support during life" and died, leaving a sister, two nephews and a niece to whom he gave legacies, held, that the testator intended his wife to have the entire use of his real and personal property for her support and maintenance during her life and, if that was insufficient for her necessary support, to draw upon the principal.

PROCEEDING for an intermediate accounting.

Carey D. Davie, for executor.

Charles R. Coville, special guardian and attorney in person for Paul Brown, an infant legatee under the will of Cyrus D. Hibbard, deceased.

KILEY, S. This is a proceeding for an intermediate accounting of the executor and necessitates a construction of the will of decedent. There is no contest over the executor's account; and the only question requiring construction here, outside of the formal settlement of the account, is the construction to be placed upon the provisions contained in the will.

Cyrus D. Hibbard died at the town of Hamilton, Madison county, New York, on the 24th day of February, 1904. He made his last will and testament, which is the one in question here, February 23, 1904, the day before he died. The provisions of the will which are up for construction in this proceeding are as follows:

"*First.* I direct that all my just debts and funeral expenses be paid.

"*Second.* I will & bequeath to my wife Louisa M. Hibbard the entire use of my Real and Personal property of whatever name & nature during her life, to draw on prin-

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cipal for her necessary support during life. Also my nephew Merton F. Hibbard 1000. (One thousand).

"To my sister Roxie Burdick $1000. One thousand dollars. Also my nephew Arthur Brown the use his lifetime of $500. and then to his son Paul Brown. Also to my niece Ann Eliza Palmiter 1000. One thousand. $200. in Savings Bank at Utica for care of Cemetery lot at Hubbardsville Cemetery.

"*Lastly,* I hereby appoint M. M. Stevens Ex. and Administrator if any Bal. to be divided according to sums named in Will. Exec. of this, my last Will and Testament; hereby revoking all former Wills by me made."

The opposing parties are agreed upon the construction to be placed upon all the provisions of the will excepting the provision made for testator's widow, Louisa M. Hibbard. The fair construction to be placed upon the provisions of the will, other than that provision made for the widow, is that the payment of the general legacies be postponed until the death of the widow. The testator omitted the word "dollars" after one thousand in two or three places in his will where he intended to use those words. The court has power to supply that omission and in the construction of the will said words are supplied. The executor will retain and invest the $200 mentioned in the will for the care of the cemetery lot in the Hubbardsville cemetery. The executor under the will shall retain possession and control of the *corpus* of the estate. This brings us to a construction of the will for making provision for the widow, Louisa M. Hibbard. The position taken by the attorney for the executor is that the will gives her, as an absolute gift for her own and separate use and for any purpose she may think best to use it, the entire income of the estate, and that she is to have her support out of the principal or *corpus* of the estate. The special guardian contends that the intention of the testator was to give to the widow the income and profit of the estate for her support and maintenance and, if that should be insufficient to properly support and maintain her, that the principal be drawn upon for that purpose. Upon this question both sides have ably maintained their position

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in able briefs submitted to me. It is unfortunate that the will in this case, as frequently happens, is crudely and inartistically drawn. The necessity of a contest like this one usually arises because the testator failed to express in clear and connected language his intention, and we, in order to do our duty by the deceased and by the living, are compelled to gather the intention from the whole instrument itself. Taggart v. Murray, 53 N. Y. 233. The absolute criterion of construction in all cases is the intention of the testator. Crozier v. Bray, 120 N. Y. 366. The testator left no descendant; he and his wife had no children; his estate consisted entirely of personal property, and it is to be presumed that his first purpose in making this will was to provide for the proper care and maintenance of his wife during her lifetime. The will discloses that he had a sister living, Roxie Burdick, and that nephews and nieces, evidently of a deceased brother and sisters, also were living at the time he made his will and that they survived him. He also gives to a grandnephew a legacy of $500, with the use of the $500 to the father, his nephew, Arthur Brown, during his lifetime. These provisions indicated that, while the predominant idea in his mind was to provide for his widow, he did not forget those of his own flesh and blood and that they were objects, to some extent at least, of his solicitation and bounty. The construction of the will as contended for by the executor or the construction of the will as contended for by the special guardian would not do violence to the uppermost feeling in the mind of the testator, namely, that his wife should be provided for. The only question here is whether the construction of the will should increase the provision from that of support and maintenance, to support and maintenance and an additional gift besides. If it was the purpose of the testator to create an independent estate in his widow and accumulate for her property that she could dispose of by her will, would he have expressed his intention in the language found in this will? Or would he have created that estate in simple language that alone would be necessary to give her an independent estate of her own? It seems to me that his effort to have his wife sup-

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ported out of the income of his estate, and feeling that that might not be sufficient and then providing she draw upon the principal, and his effort to put that in language so as to make that intention effectual, as the language was evidently his own, creates the ambiguity that we find here. From the will I cannot escape the irresistible conclusion that the testator intended, first, that his wife should be properly supported and maintained from his estate, even to the extent of using all of it, if it were necessary to properly support and maintain her in her station in life; but, that having been accomplished, the other objects of his bounty, namely, his own blood relatives, were to have the enjoyment of any balance that remained, including both the designated legacies and the residuum of the estate. It seems clear to me that the testator intended that his wife should have the entire use of his real and personal property for her support and maintenance during her life, and, if that was insufficient for her necessary support, to draw upon the principal. If that was not his purpose, it was entirely superfluous to add the words "during her life" to the provision that she have the use of the real and personal property as an independent and separate legacy, from the other provision that she be supported from the *corpus* of the estate. The provision of the will as to the wife is construed so that she will have the use of testator's estate for her maintenance and support during her natural life and, if the use and income is insufficient to properly support and maintain her in her station in life, that so much of the principal, as may be necessary, may be used for that purpose. The executor to be allowed his commissions, expenses and disbursements up to this time, and the attorney for the executor to be allowed and paid from the estate his necessary expenses and disbursements, and twenty-five dollars allowed by statute for making of the account and ten dollars per day for each day spent in the preparation, trial, argument and contest in these proceedings, and in preparing the decree. The special guardian is allowed fifty dollars, payable out of the estate. Let a decree be prepared accordingly.

Decreed accordingly.

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Matter of the Judicial Settlement of the Estate of MARIANNE KEMPF, Deceased.

(Surrogate's Court, Kings County, February, 1907.)

Executors and administrators — Compensation — Particular services, etc. — Services additional to duty as representative — Carrying on business.

Where a testatrix provides for continuing her business, an arrangement between her executrix and executor by which the latter should continue to manage the business as he had done in the lifetime of the testatrix and be paid the same compensation therefor, under which arrangement he continued to manage the business with skill and to the advantage of the estate, will be upheld.

PROCEEDING upon the judicial settlement of the accounts of executors.

Henry Fuehrer, for petitioner, executor.

Leopold Blumberg, for Francis Ketteck, general guardian for Jacob and Marianna Kempf, infants.

CHURCH, S. There is no present necessity for the determination of the time at which the various estates vest under the will in question, and I shall not now consider them. The moneys paid to the executrix for the support and maintenance of the infants appear to have been all expended. The fact that in certain of her duties she has paid the moneys to the estate does not justify her in demanding they should be repaid to her.

The arrangement that the executor, in carrying on the business, should be paid a commission based upon the amount of the business is, perhaps, a somewhat unusual one but there is nothing showing its impropriety. The executor has evidently managed this business with rare skill, as the net value of the estate has more than doubled in his hands. He states positively that the amount which he has been paid is precisely the sum he was receiving from the deceased during

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her lifetime when he was managing the business. The executrix herein presumably had fair access to the books and an opportunity to disprove this statement, if it was untrue. As she has not done so it seems proper to assume that when the deceased permitted the executor to continue the business she meant that he should receive the same compensation for its conduct as executor as he had received from her as an employee.

The commissions to the executor and the executrix will be fixed in accordance with the decision of the Court of Appeals in Beard v. Beard, 140 N. Y. 260. Account confirmed.

Decreed accordingly.

Matter of the Judicial Settlement Under the Last Will and Testament of HENRY HARTEAU, Deceased.

(Surrogate's Court, Kings County, February, 1907.)

Trusts — The beneficiary, his estate, rights and interest — In general — Distinguishing between capital and income.

Life estates — Rights of life tenants as distinguished from those of remaindermen — Stock dividends representing accumulated earnings.

Where a testator creates a trust to receive the rents, issues and profits of his estate and to apply the same to the use of certain beneficiaries and part of such estate consists of corporate shares, and where the corporation thereafter declares a dividend of its profits accumulated before the death of the testator and pays the same in new shares of stock, the stock so issued is to be deemed income and goes to the beneficiaries.

The fact that the aggregate income from the estate exceeds the amount required to be applied to the purposes designated in the will does not constitute an unlawful accumulation, but the surplus income will be ordered to be paid to the persons presumptively entitled to the next eventual estate.

PROCEEDING upon the judicial settlement of the accounts of a trustee.

John R. Kuhn, for petitioner, Mrs. Berry.

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George V. Brower, for trustees, Margaret N. Harteau, Eugene H. Winslow and Julian D. Fairchild.

William B. Ellison, Corporation Counsel, for city of New York.

Howard O. Wood, for the Brooklyn Children's Aid Society.

Greevey & Rogers, for Brooklyn Home for Aged Men.

CHURCH, S. By the will of the deceased a trust is created of his entire estate, the income from which is to be paid as therein directed; and, upon the termination of the trust, the money is to be used for the erection of a statue to General Lafayette. Among the property left by the deceased were 160 shares of stock of an insurance corporation. The trustees account for 320 shares of stock, and the life tenant contends that 160 shares of this stock should be regarded as income of the estate and not as principal.

The means by which this stock was doubled are briefly as follows:

The corporation had in its treasury a surplus of about $200,000 in cash. For the purpose of embarking in new lines of business, for which it became necessary to increase the amount of the capital stock, a meeting was held and it was resolved to double the same. Inasmuch as under the statute this stock could only be issued for value, however, it was also resolved that there should be paid to all the stockholders of record a dividend of 100 per cent. in cash out of the surplus and undivided profits; and the various stockholders thereupon with such money, which was, of course, the exact amount of the new stock issue, purchased the new stock.

This question is not a new one but has been before the courts on many occasions. The leading case on the subject is that of Sproule v. Bouch, L. R., 29 Ch. Div. 635, 653, in which this rule is laid down: "When a testator or settlor directs or permits the subject of his disposition to remain

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as shares or stock in a company, which has the power either of distributing its profits as dividend, or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under him, the testator or settlor, in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholders as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital. In a word, what the company says is income shall be income, and what it says is capital shall be capital."

This decision was followed in this State in Matter of Kernochan, 104 N. Y. 618, and Matter of Rogers, 161 id. 108.

A recent case is Robertson v. de Brulatour, 111 App. Div. 882, in which the court sums up the rule thus (p. 889): "I think it is now established that when the profits or surplus of a corporation which it has earned or realized in the management of its business are paid to its stockholders by way of dividends, whether such profits or surplus has been earned before or after the creation of the trust, so long as the amount that is actually distributed is actual surplus earned, or income or profits made by the corporation in its business and distributed as such, it is income or profits which go to the life tenant."

This case disposes of the claim of the trustee that, as the amount of this undivided surplus had been earned previous to the death of the testator, it was to be regarded as capital when paid to the stockholders. Therefore, 160 shares of the insurance stock in question have been improperly treated as capital of the estate instead of being handled as income.

A question also arises here whether under the will there exists an unlawful accumulation, and if so what its effect is upon the rights of the respective life tenants. By the provisions of the will the widow is given a life estate in the realty left by the deceased. At his death he held a mortgage on land owned by his wife, and he directed that no interest should be collected on the mortgage during her life-

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time. It is claimed that this constitutes an unlawful accumulation of interest. I am unable to agree with this contention, as it seems to me that the effect is precisely the same as if this mortgage were given to a stranger to hold in trust and to pay the interest thereon to the widow.

From the residuum of the estate the trustees are directed to pay a certain amount to the widow during her life and also a certain amount to the niece and to the contestant herein. It appears that the sum to be so paid is considerably less than the net income of the estate; and the contestant, therefore, argues that there is an unlawful accumulation.

Where the provisions of a will are lawful and complete in themselves and the accumulation arises in consequence of the fact that the income is larger than the sum directed to be paid by the testator, which fact may be occasioned either by the mistake of the testator or by the enhanced income derived from the capital, such direction will not be declared invalid, but the courts will simply order that the accumulations be paid over to the persons entitled thereto. Tweddell v. New York Life Ins. Co., 82 Hun, 602. The most recent case on this subject is Reeves v. Snook, 86 App. Div. 303. This decision not only upholds the foregoing rule, but declares that the accumulated income shall go "to the persons presumptively entitled to the next eventual estate." To the same effect is Cook v. Lowry, 95 N. Y. 103.

In the case at bar, under the peculiar language of the will, there is no person of whom it can be said that he is entitled to the next eventual estate; and it follows, therefore, that the accumulated surplus should be regarded as a fund as to which the decedent died intestate.

Let findings and decree be submitted in accordance with this opinion.

Decreed accordingly.

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Matter of the Final Judicial Settlement of the Account of the Proceedings of JEREMIAH P. ROBINSON and ISAAC R. ROBINSON, as Executors of the Last Will and Testament of JEREMIAH P. ROBINSON, Deceased.

Matter of the Final Judicial Settlement of the Account of the Proceedings of JEREMIAH P. ROBINSON and ISAAC R. ROBINSON, as Executors of the Last Will and Testament of ELIZABETH ROBINSON, Deceased.

(Surrogate's Court, Kings County, February, 1907.)

Executors and administrators — Rights and liabilities between representative and estate — Items charged or credited — Expenditures requested by next of kin or legatees.

Where all persons having vested interests sign a paper in the nature of a protection to executors for the payment of certain claims and release the executors from any responsibility therefor, they may not afterward question the propriety of such payments; and, where there is nothing to show that the claims were not just and proper, their propriety will not be questioned by the surrogate upon the settlement of the executors' accounts because, under the provisions of the will, some other persons may become entitled to a contingent remainder.

OBJECTIONS to the report of a referee.

Owen & Sturges, for accountants.

Kenneson, Crain, Emley & Rubino, for Elizabeth DeWitt Coombs, individually and as executrix.

Butler, Notman, Joline & Mynderse, for the Central Trust Co., trustee.

J. Edwards Wyckoff, for Harriet W. R. Leech, individually and as executrix.

Grant Notman, special guardian for Leech infants.

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J. Noble Emley, for William H. Coombs, trustee for Elizabeth DeWitt Coombs.

Edward J. Mone, for Josephine B. Towle.

Milan Day Barnes, for William B. Leonard.

John B. Coleman, for Mabel R. Dumbell.

Perkins & Jackson, for Esther H. Underhill.

Charles H. Kelby, special guardian for John G. Underhill and Herman L. Underhill.

CHURCH, S. The referee to whom the questions involved in the settlement of this estate were referred has made very complete findings of fact and conclusions of law, although there was no legal necessity for so doing; and, as it seems to me that his judgment is correct, it will be unnecessary in confirming his report to consider it at length, but I shall comment briefly upon the three main questions argued before me on the motion to confirm.

The objection to the sums expended in connection with the Rhode Island property, that they should be charged to income and not to principal, does not seem to me to be correct. The parties all knew what was being done and approved of the course taken, although there was no specific agreement as to the fund out of which the expenses were to come. It appears that the bookkeeper first charged them to income and then charged them to principal. Apart from the fact that the bookkeeper was the agent of all of them, the main question is: Were the items expended therefrom and are they properly chargeable to the principal of the estate? As both these questions should be answered in the affirmative, the referee's finding in this respect is correct.

The next question is as to the failure of the executors to rent certain of the Rhode Island property. The evidence shows this property to be rather unique in its nature, and whether any rental could have been obtained from it is very

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problematical. A further complication arises from the fact that the executors, who are sought to be surcharged with the rental value of such property, were also tenants in common therein. The principal that a tenant in common cannot be compelled to pay rent, unless special circumstances require it, here applies, and the referee correctly disposed of the matter.

The remaining question relates to the sums paid to Jeremiah P. Robinson. In this connection it is to be noted that every person who has a vested interest signed a paper in the nature of a protection to the executors for the payment of this money and also released the executors from any responsibility for so doing. And these are the very persons who now attempt to question the same, and some little space has been devoted in their brief to the theory that, as the statute prohibits the assignment by a life tenant of any portion of his estate, therefore, this release is void. It does not seem to me that this theory is applicable to the situation in the case at bar. A person making a release of this character is to be deemed estopped from questioning in any way the transactions which it covers. Any other view of this subject would work a gross injustice. An executor in perfect good faith may, in deference to the wishes of every one interested, pay a claim, only to find that he has been made the victim of a piece of low trickery. No attempt has been made to assail this release in any court of equity and to have it set aside on the ground of fraud or mistake, and assuredly this court has no jurisdiction to make a decision which will be as effectual as the decree of a court of equity declaring it void.

Although every person who, from present examination of the case, is entitled to share in this estate has released, it is possible that, under the provisions of the will, some other person may become entitled to a contingent remainder; and, therefore, irrespective of whether the objectors have the right to object, the questions which they have raised should be considered by the court in determining whether the rights of any person, at present unknown, have been invaded by the payment of the claims in question. So far

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as the record discloses, there is nothing to show that these claims are other than just and proper. The objectors seem to rely chiefly on the fact of the previous adjudication in the matter. As there is nothing to show the impropriety of the claims, and as every one interested in the estate has agreed to their payment, it is but fair to assume that they are perfectly proper and were rightfully paid. The report of the referee as made is confirmed.

Report of referee confirmed.

Matter of the Judicial Settlement of the Estate of HENRY OLTMANS, Deceased.

(Surrogate's Court, Kings County, February, 1907.)

Wills — Interpretation and construction — General rules — Previous acts and understanding of parties.

Former adjudication — What matters are concluded — In general — Matters actually determined.

In a case where, by reason of the inartistic manner in which a will was drawn, it is impossible to say definitely whether it was the testator's intention to create a trust or to provide for the immediate payment of certain funds to the beneficiaries but where, upon the settlement of the executors' accounts, it was assumed that a trust was created and the decree was framed accordingly, this will be regarded as an election of the parties to construe the will as creating a trust; and the surrogate will follow such construction upon the death of one of the assumed trustees and entertain an application for the appointment of a substituted trustee in his place and a trustee in the place of the remaining trustee who desires to resign his trust.

PROCEEDINGS upon the judicial settlement of the accounts of executors.

Daisy Gaus, for petitioner, Ann Margaret Gaus.

Henry P. Burr, for George O. Zollinhofer.

Goeller, Shaffer & Eisler, for Sophie Zollinhofer.

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CHURCH, S. There appears to have been a curious jumble of ideas concerning this estate, as the result of which several matters have been wrongly entitled and improper relief has been asked. Briefly stated, the situation is this:

The deceased left a will in which, after making several bequests, he made provision for his wife and certain children during their lives. The will was very inartistically drawn, and it is impossible to say definitely whether it was the intention of the testator to have these funds held in trust by trustees or whether the persons given life estates were to take the property directly and to enjoy its use for the period named in the will.

At the time of the settlement of the accounts of the executors, the parties seem to have mutually elected to treat the entire property as a trust estate to be held by the executors as trustees. It is apparent, however, that this course was not made the subject of any discussion or determination by the surrogate. Although the estate was thus technically held in trust and, hence, by the executors as trustees, yet, in the subsequent accounting and in this accounting, the trustees are referred to as executors.

The present proceeding is the outcome of the death of Charles H. Gaus, who was one of the executors named in the will and who had acted in that capacity. This is a judicial settlement of his accounts as executor by Margaret Gaus, the executrix of his last will and testament. The other executor — or trustee, as he properly should be called — Zollinhofer, has been cited upon this accounting, but he does not appear or account. When the accounts of the said executrix were passed upon, a decree was submitted providing for the appointment of an administrator with the will annexed; but, inasmuch as there were no duties to be performed by the executors as such, it was manifestly improper for an administrator with the will annexed to be appointed.

The sole question of law arising was whether the estate should be distributed among the persons having life estates therein or whether the will should be construed to create a trust, in which case it would be necessary to appoint a substituted trustee in the place of the deceased. This ques-

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tion, however, was not put in issue by the parties; but, subsequently, a decree was submitted, apparently agreed to, providing for the direct payment to the various life tenants of their proportion of the estate, upon a suitable bond being given by them under the provisions of the statute. The attention of the parties was drawn to this inconsistency with their previous decree and a request was made for evidence as to the amount for which a bond would be required. A construction of the will of the deceased is now asked by the parties, the contention on the one hand being that the entire estate should be held in trust, and on the other that it should be distributed among the beneficiaries.

As has been heretofore stated, the will is very inartistically drawn. There is no direct trust created nor are any persons named as trustees, and there is no evidence in the instrument from which the intention of the testator to create a trust can be gathered.

If this were an original question, it is doubtful whether an implied trust could be spelled out from the four corners of the will; but as, by the previous decree herein, the parties have elected to regard a trust as having been created and the surrogate has so ordered, the best interests of all concerned will be most effectively protected by continuing the estate funds in the hands of trustees.

Proceedings should, therefore, be instituted for the appointment of a substituted trustee in the place of the deceased trustee and for the appointment of another trustee in the place of the executor, Zollinhofer, who, I am informed, is desirous of resigning his trust.

When this is done, a suitable decree can be entered transferring the estate to the hands of such substituted trustees.

Decreed accordingly.

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Matter of the Estate of CHRISTIAN WICK, Deceased.

(Surrogate's Court, Oneida County, February, 1907.)

Executors and administrators: Rights and liabilities between representative and estate — Allowances — Counsel fees; Compensation — Particular services, etc.— Services additional to duty as representative — Services as attorney, etc.

An executor will not be allowed extra compensation for his services in serving citations in the proceeding for the probate of the will; and where, being a lawyer, he attends to all the business of conducting such proceeding an allowance will not be made to his brother in law, also a lawyer, for such services where the latter went to the surrogate's office at the executor's request and "simply staid until it was over" the executor thinking there might be some opposition; and where in the defense of a small claim the executor incurred unnecessary and unreasonable expense, his allowance therefor will be limited to the amount of taxable costs and disbursements.

ACCOUNTING by an executor.

H. S. Willson (D. F. Searle, of counsel), for petitioner.

E. O. Worden, for contestant.

SEXTON, S. On July 19, 1904, Peter Ammon filed his account as executor of the above estate, and, on October 30, 1906, filed a supplemental final account. December 24, 1906, Gottlieb Blessing, as executor of the estate of Anna M. Wick, widow and only interested person in the estate, filed objections to the following items in said accounts:

Witness fees in Fred Wick case.....	$32 00
To executor personally serving notices of appraisal.....	10 00
To executor personally serving citations.....	20 00
To H. S. Willson on probate of will.....	10 00
To H. S. Willson on probate of will.....	15 00
To John F. Wilson in Fred Wick case.....	25 00
To H. S. Willson in Fred Wick case.....	150 00

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Judgment against Rose Wick for costs, $76.93, and judgment against Fred Wick for costs, $169.53, should not be credited to the executor without proof that they are uncollectible.

Upon the trial, objection to the first item, witness fees, was withdrawn and the executor is hereby credited with the same. The second item of ten dollars for posting notices of appraisal by consent is disallowed.

The third item is one of twenty dollars, claimed by the executor for having himself served citations. In connection with this item the question arises: Can an executor claim an allowance for "extra services" rendered by himself in the conduct of the affairs of an estate, a compensation beyond the commissions allowed by statute? This was a service that the executor was not obliged to render. It could have been delegated to another at the expense of the estate; but he, having chosen to render the services himself, must look to his commissions for remuneration. Any other rule would be obviously dangerous. I am aware of a long line of cases where executors have been allowed extra compensation for special services not executorial, which specially benefited and enhanced the estate, but do not regard the serving of a paper by an executor within the rule laid down. It has been held that, where an attorney as an executor has rendered services to the estate, no allowance can be made to him beyond his commissions. The item of twenty dollars is disallowed. Clinch v. Eckford, 8 Paige, 412; Matter of Howard, 3 Misc. Rep. 170; Collier v. Munn, 41 N. Y. 143; Lent v. Howard, 89 id. 169; Smith v. City of Albany, 61 id. 444.

The two items of ten dollars and fifteen dollars, respectively, paid attorney H. S. Willson, for alleged services on probate of the will, are disallowed. The executor is an attorney, and prepared all of the papers and proved the will. For some undisclosed reason Mr. H. S. Willson, an attorney and a brother-in-law of the executor, sat in court for about an hour on two occasions in an *ex parte* matter, so carelessly conducted that a supplemental citation was necessary, for which the executor paid him twenty-five dollars, and now

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seeks reimbursement out of the estate. In the first account filed by the executor, he credits himself with ten dollars; and, in the supplemental account, he credits himself with fifteen dollars more for work completed at the time the first account was filed, which two items make up the twenty-five dollars involved. Mr. Willson testified, "I was there at Mr. Ammon's request, and he prepared all the papers himself, and I simply staid there until it was over; he didn't know but that there would be some opposition." Upon these facts I conclude that said services, if in fact any were rendered by Mr. Willson, have not been shown to have been necessary or beneficial to the estate. The executor, having done the work himself, is not entitled to any compensation therefor beyond his commissions; hence, he must not be allowed by strategy to circumvent the law. Matter of Holland Trust Co., 24 N. Y. Supp. 850, and cases cited.

It is urged that the item of twenty-five dollars paid to John F. Wilson, and seventy-five dollars paid to H. S. Willson, and seventy-five dollars paid to D. F. Searle, as attorneys, making a total of one hundred and seventy-five dollars, exclusive of disbursements by the executor, for their services in an action in the Supreme Court, brought by Fred Wick, to recover one hundred and twenty-two dollars claimed for services against the deceased, is too much and should be reduced to sixty-five dollars, the taxable costs. Section 2730 of the Code of Civil Procedure provides that, "in all cases such allowance must be made for their necessary expenses (executors and administrators), actually paid by them as appears just and reasonable." Christian Wick, whose estate is here involved, died in May, 1903. His will was probated in June, 1903. Peter Ammon, named as executor therein, qualified and is now acting. Fred Wick, a nephew of the deceased, April 21, 1904, presented to the executor a verified claim against said estate for "doing work and chores through the winter, from April 1, '01, to April 1, '02, $50.00, and doing work, chores and farm work from April 1, '02, to April 1, '03, $72.00, making a total of $122.00." This claim was rejected, and on July 19, 1904, the executor filed his final account. July 31, 1904, claimant in writing

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offered to have the same determined by the surrogate, under section 1822 of the Code. This was refused by the executor. September 13, 1904, claimant commenced an action in Supreme Court. Issue was joined and the case noticed for trial for November 7, 1904, at Rome, N. Y. In some manner not disclosed by the evidence before me, the trial of the case was begun before Mr. O. P. Backus, as referee, on June 1, 1905, and thereafter, in October, 1906, he rendered his decision dismissing the complaint with costs. His fees were paid in the amount of seventy dollars.

Attorney John F. Wilson did work covering seventy-four of the eighty-eight pages of the referee's report, and had paid to him for his services twenty-five dollars. H. S. Willson and D. F. Searle did work covering the remaining fourteen pages of the report, and Searle summed up. H. S. Willson was connected with the case from the beginning. One hundred and fifty dollars was paid them, which was divided. The summing up took two hours. The eighty-eight pages of the referee's report, if written in ordinary long-hand, would cover about forty pages, and represents not to exceed four days' work.

In the estate there were $917.50 in the bank and real estate worth about $600. The plaintiff prosecuted his case with one attorney, and the executor, himself an attorney, had the help of three different attorneys in the defense of the action.

On the facts presented I do not think the executor wisely and frugally managed the estate. One of the attorneys testified, "Since 1882 I tried only two cases alone in courts of record. I don't like the practice of trying cases." It was bad management to employ a man to try a case, to whom trials were so distasteful that the executor felt called upon to employ two other lawyers to help him. The plaintiff, having offered to let the surrogate try his claim, much would have been saved the estate had the executor consented. When the case was on the Supreme Court calendar, if it had been tried there, referee's fees of $70 could have been saved. Mr. Searle testified that had he been employed in the first place he could have carried it through alone. Attorney McMahon, witness for the executor, testified that

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likely there were perhaps a dozen attorneys in Rome, any one of whom could have done the same thing. He also said it would not be good business to spend $175 on attorneys to defend a claim of $122. The total amount of costs and disbursements incurred in the defense of this claim is $313.09, which seems entirely out of proportion to the amount involved and the size of the estate, which is about $1,500. This executor very likely proceeded upon the theory, quite prevalent, that any controverted question in connection with an estate can be safely litigated, provided he acts in good faith and under advice of counsel. This is not the rule. Estates cannot be frittered away in litigations involving trifling amounts. Any other rule would enable a conscienceless executor to practically distribute the property of the dead among his friends at the bar. An executor is required by law to exercise a reasonable measure of intelligence, and such ordinary discretion and judgment as men usually exercise in the management of their own affairs. Matter of Huntley, 13 Misc. Rep. 375, and cases cited.

I conclude and find that it was negligent management of this estate for the executor, upon the facts, to have employed an attorney unable to conduct the defense of the action; also to have refused to permit the surrogate to determine this claim, or at least to have declined to do so; also to have taken the case from the Supreme Court calendar, where it might have been tried before a jury without the expense of seventy dollars paid the referee.

There is evidence before me that the taxable costs, amounting to sixty-five dollars, are fair compensation for the work of the defense of this action, and the same are hereby allowed the executor in full of attorneys' compensation in the Fred Wick action. These do not, however, include disbursements; they may be added. The balance of the claim for amount paid by executor to attorneys in the Fred Wick action is disallowed.

All admit, what is well known, that the value of legal services is, to a considerable extent, a matter of opinion; but, in arriving at the same, various well-defined elements must be considered, such as, in this case, the amount involved

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in the estate, the character and amount of the work done, the time occupied in its performance; the result, the standing and reputation of the attorneys performing the services; and the courts have uniformly refused to limit attorneys' fees to specified and detailed bills of particulars, with fixed amount for each item, as in case of goods sold or manual services rendered. Matter of Sewell, 32 Misc. Rep. 604, and cases cited.

The claim of Dr. E. C. Reams should be reduced from thirty-three dollars to thirty-two dollars.

The judgments for costs are properly set out in the final account.

Decreed accordingly.

Matter of the Estate of J. HOWLAND PEARCE, Deceased.

(Surrogate's Court, Oneida County, February, 1907.)

Wills — Interpretation and construction — Conditions, contingencies and alternatives — Rules and implications — Intent to require election Heirs, devisees and legatees — Mutual rights and liabilities — Election — Between testamentary provision and individual estate.

Where a testator left legacies to the children of a deceased son and to a daughter, and the residue to another daughter with whom he lived, and declared that the legacies to his grandchildren and daughter were in payment of the distributive shares to which such legatees might be entitled in and to the residue of a certain life estate given the testator under the will of his late wife; and where it appeared that the will of testator's wife to which he referred gave to him the net income of her entire estate for life and, at his death, to her three children, equally, with a provision that issue of a deceased child should take the parent's share, held, under the circumstances of the case, that the testator intended, by the provision in his will that the legacies therein mentioned should be in payment of the distributive shares of the legatees in his wife's estate, to refer only to such unexpended accumulation of net income from her estate as he might have at the time of his death and not to the gifts of the remainder of the capital of her estate contained in her will.

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Upon the settlement of both estates after the husband's death there should be allowed to his executors $150, under subdivision 5 of section 2713 of the Code of Civil Procedure, from his wife's estate.

The executors of the husband's will are not to be charged with commissions upon his wife's estate until the decree is made settling her estate, as such commissions are not allowed until then.

CONSTRUCTION of third clause of will.

C. Lansing Jones, for executor.

Henry F. Coupe, for contestant.

A. G. Senior, special guardian.

SEXTON, S. Sarah E. Pearce and J. Howland Pearce were husband and wife, living together, each owning a separate estate, which they respectively disposed of by will. Said wills were heretofore duly admitted to probate without objection.

The will of Sarah E. Pearce was dated December 5, 1890, under which J. Howland Pearce received the net income of the entire estate for life, and at his death all went equally to three children, with a provision that issue of a deceased child should take the parent's share. The gross personal estate was $2,298.77, $2,052.87 of which was at interest.

The will of J. Howland Pearce was dated August 24, 1905, and in its first provision gave to four children of a deceased son $125 each; and in its second provision gave to a daughter, Elizabeth I. Scrafford, $500; and all the rest to his daughter Roxanna B. Douglass.

His gross personal estate amounted to $2,222.05 and his real estate concededly worth $2,000, making his total estate $4,222.05.

Sarah E. Pearce died April 25, 1905, and J. Howland Pearce, executor of her estate, died August 28, 1905. Roxanna B. Douglass, one of the executors of J. Howland Pearce's estate, was appointed administratrix with the will

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annexed in the Sarah E. Pearce estate, and has filed her final account in each estate.

Before the distribution of the respective estates can be decreed, the third clause of the will of said J. Howland Pearce must be construed. It is claimed by the executors of his will, one of whom is the residuary legatee therein named, that the four grandchildren and the daughter named as legatees under the first and second clauses of said will cannot take thereunder without relinquishing their uncontested right to take under the will of Sarah E. Pearce, as residuary legatees, because of the language used and conditions imposed in the third clause of said J. Howland Pearce's will.

The language involved is as follows: "*Third:* The legacies contained in the foregoing clauses first and second are hereby expressly declared to be in payment of the distributive share which the legatees therein named may be entitled in and to the residue of a certain life estate given to me under the will of my late wife, Sarah Pearce," etc.

The above language, taken in connection with the entire will, indicates that the testator had in mind the accumulation of his life interest in his wife's estate, and intended to will the "residue" or the unused portion thereof to his daughter, Roxanna B. Douglass, under the residuary clause of his will. He had an estate of his own amounting to $4,222.05 and a life estate in his wife's property, $2,052.87 of which was at interest, and was living frugally, with his daughter Roxanna B. Douglass, in the homestead, consisting of a house, barn and a few acres of land in the small village of Washington Mills, N. Y. Had he lived ten years — as he might have anticipated at the time of making his will — the accumulations of his life interest of his wife's estate at six per cent. would have amounted to $1,231.70, more by $231.70 than the legacies in question aggregate.

From the reading of the entire will it seems clear that he intended to favor his daughter Roxanna, hence gave her all his estate except $1,000, amount of legacies in the first and second clauses, and all accumulations of his life estate under his wife's will.

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He also provided in substance that, if said legatees should refuse to accept a legacy under the condition imposed, or should present any claim against his estate, or contest the will, the legacy so given should be null and void and become a part of the residuary estate.

The testator intended that said legatees mentioned in the first and second clauses of his will should have $1,000, only, of his entire estate, which included accumulations of his life estate as well as all of his own property, to accomplish which he imposed the above stringent conditions, none of which have been violated by said legatees.

The persons named as legatees in the first clause of said will are J. Howland, Douglass, Edna and Willard Pearce, children of a deceased son of the testator, Marenus S. Pearce. The person named as legatee in the second provision of said will is Elizabeth I Scrafford, a daughter of the testator.

There are no facts before me indicating any dislike, on the part of the testator, for his said daughter or grandchildren. I am, therefore, loath to place a construction upon his will which would revoke, cut down or modify these legacies, which are absolute upon their face, or disinherit an heir, or which would prevent the issue of a deceased child from participation in the distribution of the estate. Goodwin v. Coddington, 154 N. Y. 283. I do not think the language used in the third clause of said will is ambiguous or of doubtful meaning; but, if that were the fact, then it would be my duty to hold that, where an estate is given in one part of a will, in clear and decisive terms, it cannot be taken away or cut down by raising a doubt as to the meaning or application of a subsequent clause, nor by any subsequent words which are not as clear and decisive as the words giving the estate. Banzer v. Banzer, 156 N. Y. 429.

It is contended by the residuary legatee, Roxanna B. Douglass, that the legatees named in the first and second clauses of her father's will cannot take under her father's will and also under the will of her mother, Sarah E. Pearce, because of the language used in the third clause of the will of her father, J. Howland Pearce, and that this court, to that end, has the right to and should reconstruct, if need be,

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the said third clause. The duty of the court is to interpret, not to construct; to construe a will and not to make a new one. Tilden v. Green, 130 N. Y. 29, 51.

It is manifest that the testator had no intention of forcing an election upon the legatees named in the first and second clauses of his will, who are also named as residuary legatees in the will of his wife, Sarah E. Pearce. There seems to be no doubt but that the testator intended to give the legatees named in the first and second clauses of his will a portion of his estate in addition to what they were to receive from his wife's estate under the residuary clause of her will, and that he also desired to leave the bulk of his estate with the daughter with whom he was residing, namely, Roxanna B. Douglass, and, to make sure that the legatees named in the first and second clauses of his will should receive no more than the amounts therein specified, he required them, as a condition, to accept the legacies in full payment, to make no claim for any accumulations to the credit of his life estate in his wife's property, and to present no bills against his own estate, of any kind, and not to cut down his own estate to the detriment of his favored daughter by will contest. It is not urged that any of these conditions have been violated; hence, the legatees named in the first and second provisions of J. Howland Pearce's will are each entitled to the legacies, as each of said clauses provides, upon each filing a proper release of all claim in and to said life estate in the estate of Sarah E. Pearce.

The legatees named in the will of Sarah E. Pearce take as therein provided.

The account in the Sarah E. Pearce estate is modified as follows:

"Schedule A." The administrator is charged with cash in savings bank in the amount of $617.28.

"Schedule C." Dr. Boden's bill of $27.25 and Dr. Guillaume's bill of $60.50 are both disallowed and charged against the estate of J. Howland Pearce.

The items of funeral expenses, $110.50; marking monument, $2; digging grave $6, are allowed against the estate of Sarah E. Pearce. Matter of Very, 24 Misc. Rep. 139.

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It is claimed that the item of $150, being the statutory allowance to the surviving husband, is not a legal charge against the estate of Sarah E. Pearce. Such an allowance is provided for in the last sentence of section 2713 of the Code of Civil Procedure. By section 2724 the surrogate may, on a judicial settlement, award in money to the surviving husband, wife or child, in a proper case, the value of such exemptions. The item of $150 is allowed to the estate of J. Howland Pearce, and is properly charged against the estate of Sarah E. Pearce. Matter of Warner, 53 App. Div. 565.

The item of thirty-nine dollars and fifty cents, commissions claimed as part of the estate of the deceased executor, is disallowed on the ground that commissions are to be deducted as of the date of the settlement of the account and not as of the date of filing it. They have not yet been allowed by the court, and are not part of the estate of J. Howland Pearce. The deceased executor, if living, would not at this moment be entitled to commissions in the Sarah E. Pearce estate. How, then, is his estate entitled to commissions at this time? Wheelwright v. Rhoades, 28 Hun, 57; Beard v. Beard, 51 N. Y. St. Repr. 735.

The expense of probate of the Sarah E. Pearce will and letters of administration with the will annexed in her estate amounting to $29.30 is allowed against her estate.

No vouchers have been filed and no evidence given as to payments made in either the estate of J. Howland Pearce or Sarah E. Pearce, as required by section 2729 of the Code of Civil Procedure. This objection being made by the special guardian goes to the jurisdiction of the court to make the decree sought. Should the special guardian or any other interested person desire a further hearing upon the subject of payments actually made, such proof to be taken in lieu of vouchers, in case they are lost or destroyed or were not obtained, such hearing may be had at some time to be agreed upon. Matter of Wicke, 74 App. Div. 221.

The special guardian takes the position that he cannot fully protect the rights of the infants represented by him, because no inventory has been filed in the Sarah E. Pearce

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estate, and he is unable to ascertain the true and correct amount and value of said estate. Permission will be given him to produce in court such witnesses as he may desire upon the subject of the amount and value of said estate at the time of the death of the testator, and the disposition thereof.

A decree may, therefore, be entered in each estate in accord with the foregoing conclusions, and after compliance with said section 2729 of the Code of Civil Procedure, and as to the balance of said accounts the same is confirmed.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of CHARLES S. ALLISON, as Administrator of the Goods, Chattels and Credits of ELI ALLISON, now Deceased, as Trustee Under the Last Will and Testament of WILLIAM J. LAZEAR, Deceased.

(Surrogate's Court, Steuben County, February, 1907.)

Wills — Interpretation and construction — Terms defining quantum or duration of estates or interests — Rules and implications — "Heirs" or "children" — Words of inheritance or purchase.

Where a testator appointed two trustees to hold certain securities and re-invest the same when paid and pay the interest, one-fifth to his son and four-fifths to his grandson, the latter's interest to be paid for his support and education until he was twenty-one and after that to him directly; and the interest to be paid to the son and grandson during their natural lives; at the death of the son the whole interest to be paid to the grandson and at the latter's death the principal to be paid to his children if he should have any, and, if not, to the testator's granddaughter "or her heirs"; upon the judicial settlement of the accounts of the trustees after the death of the grandson without children, held, that the testator's granddaughter took a vested remainder in the fund upon the testator's death, the payment thereof to her only being postponed, and that such remainder was not divested by the death of the granddaughter prior to that of the grandson, the words "or her heirs" being equivalent to the words "and her heirs" and not denoting a limitation of the granddaughter's estate nor being words of substitution, importing that her heirs should take as purchasers, but

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that such remainder passed under the granddaughter's will upon her death subject to the beneficial use for life of the son and grandson of the original testator and on the grandson's death subject to the life use of the son; and, upon consent of the parties under such construction of the will, four-fifths of the principal will be paid over to the granddaughter's executor and one-fifth retained and the interest thereon paid to the son annually during his life.

PROCEEDING upon the judicial settlement of the accounts of an administrator.

John F. Little, for Charles S. Allison, as administrator, etc.

James McCall and William H. Nichols, for Minor E. Swarthout, individually and as executor of the last will and testament of Frank Swarthout, deceased.

Henry C. Harpending, for Cornelius G. Lazear and Nellie Lazear, and for Marvin Price, as administrator, etc., of William J. Lazear, 2d.

WHEELER, S. This is a proceeding commenced by Charles S. Allison, as administrator of the goods, chattels and credits of Eli Allison, deceased, as trustee under the last will and testament of William J. Lazear, deceased, for the judicial settlement of the account of said Charles S. Allison, as administrator, etc., of Eli Allison, as such trustee, and for the distribution of the funds of said estate of William J. Lazear, deceased, which were held by said Eli Allison, as trustee under said will.

There is no question as to the correctness of the account of said administrator, or of the said trustee. The only question is, who owns the principal of the trust funds, when and to whom the same shall be paid, and whether the trust mentioned in the will of William J. Lazear still continues as to the whole of said principal fund, during the lifetime of Cornelius G. Lazear; or whether one-fifth of the principal of said fund continues to be held in trust during the lifetime of said Cornelius G. Lazear.

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The answers to these questions involve the construction of the last will of said William J. Lazear, deceased.

William J. Lazear died in the town of Wayne, Steuben county, N. Y., on the 29th day of January, 1883, leaving his last will and testament, dated and executed on the 24th day of January, 1883. This was drawn by a layman. He left no real property, and his estate consisted wholly of personal property. The said will was thereafter, and on the 12th day of February, 1883, duly proven and admitted to probate, as a will valid to pass real and personal property, by a decree of the Surrogate's Court of the county of Steuben, made and entered that day, and on said date, letters testamentary thereon were duly issued by and out of said court to Silas A. Price and Eli Allison, as executors and trustees, who were named in said will as such, and they thereupon entered upon the discharge of their duties as such executors and trustees.

The inventory of the estate of said William J. Lazear, made by his executors and duly filed in said surrogate's office, showed that the said personal estate was of the value of about $18,000, of which a little over $17,250 consisted wholly of notes and mortgages, and that about $750 only consisted of money and a few articles of tangible personal property.

The only next of kin and heirs-at-law who survived the said testator were Cornelius G. Lazear, his son, and Mrs. Frank Swarthout, the daughter of a deceased daughter of the said testator. The said deceased daughter of the testator was Mrs. Eli Allison. The testator never had any other children than Cornelius G. Lazear and Mrs. Eli Allison.

At the time of testator's death, the said Cornelius G. Lazear had one child, named William J. Lazear, and called William J. Lazear, 2d, who was the grandson of the testator. At the time the testator made his said will and at the time of his death, the ages of said testator, Cornelius G. Lazear, Mrs. Frank Swarthout and William J. Lazear, 2d, were, respectively, seventy, forty-three, sixteen and twelve years. The said Frank Swarthout, at the time the said will was made and at the time of testator's death, was the wife of

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said Minor E. Swarthout, and the daughter of said Eli Allison and Mrs. Eli Allison, aforesaid. The said Frank Swarthout was married to the said Minor E. Swarthout in the fall of 1882.

The said Frank Swarthout died November 13, 1891, being then over eighteen years of age, and leaving her surviving no child or children or descendant, no brother or sister, but only her husband, Minor E. Swarthout, and her father, the said Eli Allison. Her said father was her sole heir-at-law. The said Frank Swarthout left a last will and testament, bequeathing all of her personal property to the said Minor E. Swarthout, her husband, which will was shortly thereafter duly proven and admitted to probate as a will valid to pass personal property, by a decree of the Surrogate's Court of the county of Steuben, duly made and entered; and in and by said will, the said Minor E. Swarthout was named as sole executor thereof; and at the time the said will was probated, letters testamentary thereon were duly issued by and out of the said Surrogate's Court to the said Minor E. Swarthout and he thereupon became, and ever since has been, the sole acting executor thereof.

The said William J. Lazear, 2d, died in Denver, Col., on July 19, 1906, intestate, and leaving no child or children surviving him, but leaving his widow, the said Nellie Lazear, and leaving, as his sole next of kin and heir-at-law, his father, the said Cornelius G. Lazear.

Thereafter and before the 29th day of December, 1906, the said Marvin Price was duly appointed as administrator of the goods, chattels and credits of the said William J. Lazear, 2d, by a decree of the Surrogate's Court duly made and entered.

The said Eli Allison died, intestate, May 31, 1906, at said town of Wayne, leaving him surviving no descendant, widow or parent, but leaving him surviving as his sole next of kin and heirs-at-law, his brothers, Charles S. Allison and William Allison, and his sisters, Mrs. Whitehead, Mrs. Salt and Mrs. French, the wife of said Eli Allison having died prior to the time of the death of said testator, William J. Lazear.

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Shortly after the death of said Eli Allison, the said Charles S. Allison was duly appointed by this Surrogate's Court as sole administrator of the goods, chattels and credits of said Eli Allison, deceased, and thereupon duly qualified; and letters of administration on said personal estate were duly issued to him, and he has ever since been acting as such administrator.

At the time the said William J. Lazear, the testator, made his said will, and at the time of his death, he was residing with the said Eli Allison at the latter's home in the town of Wayne, Steuben county, N. Y., and the said William J. Lazear had made his home with said Eli Allison for three or four years next preceding the time of his death.

In the fall of 1882, at the time of the marriage of said Frank Swarthout to Minor E. Swarthout, the family of said Eli Allison consisted of said William J. Lazear, the testator, said Frank Swarthout, said William J. Lazear, 2d, and Eli Allison; and the said William J. Lazear, the testator, and William J. Lazear, 2d, his grandson, continued to reside with said Eli Allison, at his said home, up to the time of the death of said testator, William J. Lazear.

At the time the will of said William J. Lazear was made, his son, Cornelius G. Lazear, was living in New York or Brooklyn, and he had been living away from his father, William J. Lazear, the said testator, from in or about the year 1876 or 1877; and the said Cornelius G. Lazear had been leading a somewhat dissipated life, which was known to his said father; and he did not have any property to speak of at the time the said will was made, and had practically been out of business for several years before, and apparently had not succeeded in business, but had lost money in business. He had lived in different places and, at the time he was living in New York, he had not been in any business that amounted to anything.

While the said grandson, William J. Lazear, 2d, resided with the said Eli Allison, as aforesaid, the said testator, William J. Lazear, paid said Eli Allison for his said grandson's board and lodging.

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On the 21st day of April, 1884, the said Surrogate's Court made and entered a decree in proceedings commenced by Silas A. Price and Eli Allison, as such executors, to judicially settle their account as such executors, in and by which decree it was adjudged that the said executors had on hand $8,050 of said trust estate; and they were directed to hold the same pursuant to the terms of said will as trustees therein named, and were then discharged and released from all other obligations and liabilities as such executors.

Thereafter, and in or about the year 1893, a decree was made by said Surrogate's Court, in proceedings brought therein for that purpose, whereby the account of said Silas A. Price, as such trustee, was duly accepted, and he then ceased to act as such trustee, and the said trust funds of $8,050 were paid over and transferred to the said Eli Allison, his cotrustee; and, thereafter, and until the time of the death of said Eli Allison, on the 18th day of May, 1906, the said Eli Allison continued to act as sole trustee under said will of William J. Lazear, deceased.

No trustee of said trust fund has been appointed to fill the vacancy caused by the death of said Eli Allison.

The following is a copy of so much of the will of William J. Lazear, deceased, as disposes of his property:

"After the payment of my just debts and funeral expenses, I give, devise and bequeath to my son, Cornelius G. Lazear, and my grandson, William J. Lazear, the use of notes and mortgages as follows: (here are enumerated certain notes and mortgages) being about $8,200, and I hereby appoint Silas A. Price and Eli Allison trustees to hold the above notes and mortgages, and they shall reinvest the same, when they shall be paid, to the best advantage, and shall collect the interest and pay it as follows: One-fifth to my son Cornelius G. Lazear and four-fifths to my grandson William J. Lazear. The said interest for my grandson shall be paid for his support and education until he is twenty-one, after that go to him direct. This interest shall be paid annually during their natural life. At the death of Cornelius G. Lazear, the whole of said interest shall be

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paid to William J. Lazear, and at his death, the principal shall be paid to the children of said William J. Lazear, if he shall have any, if not it shall be paid to my granddaughter, Frank Swarthout, or her heirs.

"*Second.* I give, devise and bequeath to my granddaughter, Frank Swarthout, the balance of my mortgages and notes, which is in amount equal to that given to my son and my grandson.

"*Third.* If there shall be anything left of my personal property in the shape of money or notes, other than mortgages and notes, it shall be equally divided between the three above described."

Charles S. Allison, as administrator, etc., claims that the principal of said trust fund belongs to him as such administrator.

Minor E. Swarthout claims that the principal of said fund belongs to him as such executor of the last will and testament of his wife, Frank Swarthout, deceased, and to him as sole legatee under said will.

Cornelius G. Lazear claims that the principal of said trust fund belongs to him by operation of law; that is, because he was, at the time of the death of William J. Lazear, 2d, the then sole heir-at-law of Frank Swarthout, deceased.

Neither Nellie Lazear nor Marvin Price, as administrator, claims any interest in said fund.

Cornelius G. Lazear claims that the remainder in said fund did not vest at the death of the testator, but that it was a contingent remainder and vested at the death of William J. Lazear, 2d, in the person who was then the surviving heir-at-law of Frank Swarthout; and Cornelius G. Lazear claims that inasmuch as the remainder did not vest until the death of William J. Lazear, 2d, and that Frank Swarthout died before William J. Lazear, 2d, and that her father, Eli Allison, who survived her, also died before William J. Lazear, 2d, the only heir-at-law of Frank Swarthout, at the time of the death of William J. Lazear, 2d, was Cornelius G. Lazear, as he was the brother of the mother of Mrs. Frank Swarthout.

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Charles S. Allison, as administrator, claims that the said remainder vested at the time of the testator's death in Mrs. Frank Swarthout, who survived the testator, subject, however, to be divested from her, in case she failed to survive William J. Lazear, 2d, and, in any event, to be divested if William J. Lazear had children.

Minor E. Swarthout, as executor and individually, claims that the said remainder vested at the death of the testator absolutely in Mrs. Frank Swarthout, subject only to be divested by William J. Lazear having children; and he claims that the fact that Mrs. Frank Swarthout died before William J. Lazear, 2d, of itself, did not divest her of said remainder, but that she could alienate the same by gift, sale or by bequest, so that her alienee would take the title to the same, subject only to the contingency that William J. Lazear, 2d, had children.

It is conceded that William J. Lazear, 2d, never had any children; consequently that contingency need not be considered in discussing the claim of Charles S. Allison, as administrator, or Mr. Swarthout, as executor, etc.

We will first consider the claim of Cornelius G. Lazear. There are several cardinal rules in the construction of wills which may be referred to in the discussion of the several questions involved, viz.: The intention of the testator, which is to be derived from the language of the will itself, and which is to be interpreted in the light of surrounding circumstances, is the controlling element in the construction of wills and, so far as the same can be ascertained in accordance with the rule stated, shall be taken into consideration and carried into effect. Byrnes v. Stilwell, 103 N. Y. 458.

Aid may be sought from the situation and the relation of the parties. Matter of Russell, 168 N. Y. 174.

The law favors the vesting of estates. Stokes v. Weston, 142 N. Y. 433.

The remainder shall not be considered as contingent in any case where, consistently with the intention of the tes-

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tator, it may be construed as vested. Hersee v. Simpson, 154 N. Y. 496; Connelly v. O'Brien, 166 id. 408.

The rule is that, where a person or persons to whom, or the event upon which, the estate is limited to take effect, remains uncertain until the termination of the life estate, the remainder is contingent. Clark v. Cammann, 160 N. Y. 327.

If when the will goes into effect there is no contingency either as to the person entitled in remainder, or as to the event by which the intermediate estate is to be determined, then the remainder is vested. Van Axte v. Fisher, 117 N. Y. 403.

If the postponement of the payment is for the purpose of letting in an intermediate estate, then the remainder shall be deemed vested at the death of the testator, and the class of legatees is to be determined as of that date, for futurity is not annexed to the substance of the gift. Matter of Crane, 164 N. Y. 71.

The word "heirs," when applied to the succession of personal property, means next of kin. Tillman v. Davis, 95 N. Y. 17; Drake v. Pell, 3 Edw. Ch. 251; Wright v. M. E. Church Trustees, 1 Hoff. Ch. 202.

The words "and heirs" are words of limitation and not of purchase. Thurber v. Chambers, 66 N. Y. 42; Matter of Allen, 151 id. 248; Matter of Wells, 113 id. 396.

The words "or heirs" may be construed as "and heirs," and the words "and heirs" may be construed as "or heirs," in order to effectuate the apparent intention of the testator. Miller v. Gilbert, 144 N. Y. 74; Roome v. Phillips, 24 id. 463; Davidson v. Jones, 112 App. Div. 255; Matter of Smith's Estate, 11 N. Y. Supp. 783; Jackson v. Blanshan, 6 Johns. 56; Miller v. Caragher, 35 Hun, 485.

The words "then to pay after the termination of the life estate" do not mean a gift *in futuro*, but a present gift, and vest the remainder upon the death of the testator, but postpone the enjoyment of the gift until the death of the life tenant. Roosa v. Harrington, 171 N. Y. 341.

The books are full of authorities holding that the words "when," "then," "after," "hereafter" and "upon," do

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not mean that the vesting of a remainder is postponed; but the enjoyment of the remainder is postponed by the use of said words.

The general rules for the construction of wills are not controlling, they are but aids to the construction; and, where the language of the will itself is reasonably plain, or not obscure, recourse to these rules is not necessary. They are simply to aid in ascertaining the intention of the testator, when considering the language of the will, and the relation and situation of the testator, and the parties affected. As stated in Matter of Russell, *supra*, aid may be sought from the situation and the relation of the parties. It is clear from the reading of the will in question, that the testator only intended to give his son Cornelius G. Lazear, the use, for his life, of one-fifth of one-half of all his notes and mortgages, and to his grandson, William J. Lazear, 2d, the use for his life, of four-fifths of one-half of all his notes and mortgages, and that he did not intend that either should ever have any portion of the principal of his bonds and mortgages; and it appears that, at the time he made this will, all of his estate, with the exception of about $750, consisted of bonds, notes and mortgages, and that the residuary clause of said will would not have carried to exceed $750 of personal property; so he practically excluded his son and his grandson from any enjoyment of his estate except the incomes above stated. His son, it appears, had not been successful in business, was practically insolvent, and had not resided with him in many years. His grandson was about twelve years of age, and his father apparently was not supporting him, but the testator was supporting him at the home of Eli Allison; and it is evident that the testator did not consider it prudent or wise to entrust either his son or his grandson with the ownership of his estate, and that it was wise that about one-half of the same should be placed in trust for their use and benefit, and so placed that they could not disturb or waste any of the principal.

So, by a plain reading of the will in connection with the relation of the parties, it is apparent that he did not intend

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his son, Cornelius G. Lazear, or his said grandson ever to receive any of the principal, except possibly a small share in the residuary estate of $750. The fact that the will provides that, upon the death of William J. Lazear, 2d, without children, the principal of said trust fund "shall be paid," etc., does not mean that the vesting of the said remainder was postponed, but that the enjoyment of the same was postponed. Roosa v. Harrington, *supra,* and many other cases.

The remainder in said fund was not contingent under the rules, for Mrs. Frank Swarthout was alive, she being the person mentioned as entitled in remainder; and it was not uncertain as to the event by which the intermediate estate was to be determined, for that event was the death of William J. Lazear, 2d, and his death was certain: so there was neither a contingency as to the person entitled in remainder or as to the event by which the intermediate estate was to be determined. So that under the rule stated in Van Axte v. Fisher, *supra,* this remainder was not a contingent, but a vested one.

It is apparent that the testator thought a great deal of his granddaughter, Mrs. Frank Swarthout, in whose family he had lived, for he gave by his will one-half of all his notes and mortgages to her, absolutely. He placed no restriction upon his gift to her, although he knew she was then married to Minor E. Swarthout; and I am satisfied that it was the intention of the testator to give all his notes and mortgages to Mrs. Frank Swarthout, subject to the trust in the executors to collect the income on one-half thereof for the benefit of the son and grandson, during their lives, and subject to William J. Lazear, 2d, having children. He evidently wished to provide an annual income for his son and grandson, during their lives, and that all the rest of the notes and mortgages should belong to Mrs. Frank Swarthout, unless William J. Lazear, 2d, had children; and, therefore, the remainder was not a contingent one, but vested in Mrs. Frank Swarthout on the death of the testator, and, therefore, Cornelius G. Lazear has no interest in the principal of said fund.

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The only difference between the claims of Charles S. Allison, as administrator, etc., and Mr. Swarthout, as executor, etc., is that the former claims that the remainder, though vested at the time of the testator's death, was divested by reason of Mrs. Swarthout's death before the death of William J. Lazear, 2d; and the latter claims that the remainder vested in her absolutely at the testator's death.

Mr. Allison bases his claim upon the words "or her heirs," in that part of the will where it says, "the whole of said interest shall be paid to William J. Lazear, 2d, and at his death, the principal shall be paid to the children of William J. Lazear, 2d, if he shall have any, if not, it shall be paid to my granddaughter, Frank Swarthout, or her heirs."

Mr. Allison contends that the words "or her heirs" have not the same effect as the words "and her heirs," and that the words "or her heirs" shall not be construed as words of limitation, but as words of purchase, or of substitution; and that, when Mrs. Swarthout died, during the lifetime of William J. Lazear, 2d, leaving her surviving, as her sole heir at law, Eli Allison, then, by force of the words "or her heirs," the said remainder became vested in Mr. Eli Allison, and that Charles S. Allison, as administrator, etc., by operation of law takes the title to the said remainder.

We have above quoted several cases which held that the words "or heirs" may be construed as "and heirs" and *vice versa*.

It must be remembered that this will was not drawn by a lawyer, but was drawn by a layman, and from its appearance it was not artistically drawn, and that there may be elasticity used in construing the words "or heirs," which were used by this layman.

In the first place it is noticeable that he used the word "heirs" in reference, not to real estate, but to personal property, and the will nowhere purported to dispose of real estate. It is plain, on its face, that it was disposing of personal property only, and yet the scrivener used the word

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"heirs" where he should have used the words "next of kin."

In the case of Connelly v. O'Brien, 166 N. Y. 406, the Court of Appeals shows how far it was willing to go in order to construe a remainder into a vested one. In that case it construed the word "then" to refer to the time of the death of the testator, instead of to the time of the termination of the life estate.

In the case of Miller v. Caragher, 35 Hun, 485, where the gift was to a person, from the deceased "to Henry or his heirs," the court held, that the remainder vested in Henry, if he survived the testator, and went to his heirs only in case Henry had died before the testator. In that case it was construed that by the words "or his heirs" it meant that, in case Henry died before the testator, then it would go to his heirs; but, in case Henry survived the testator, then the words "or his heirs" were words of limitation and not of purchase, or of substitution. Matter of McCormick v. Barker, 2 Dem. 137; Wright v. M. E. Church Trustees, 1 Hoff. Ch. 202.

In the above cases the words "or heirs" were construed to mean words of purchase, and in those cases it was held that, where there was a gift to a person or his heirs, those words meant that, in case the legatee died before the testator, then the words "or heirs" became words of purchase; but that, in case the legatee survived the testator, then they were construed as words of limitation, or perhaps, more correctly speaking, they were not considered at all, but were of use only in case the legatee failed to survive the testator, and that the testator in using those words referred to the case of the death of the legatee during the testator's lifetime, and not the legatee's death at any period after the death of the testator.

To my mind Miller v. Gilbert, 144 N. Y. 68–75, Davidson v. Jones, 112 App. Div. 255, should determine the contentions between Mr. Allison, as administrator, and Mr. Swarthout, as executor, etc.

In Miller v. Gilbert the will provided as follows: The testator gave to his wife the use, etc., of certain houses and

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lots so long as she continued his widow, and when she ceased to be such by death, then the premises were directed to be sold, and the proceeds equally divided among the testator's four children named, "or their heirs." The four children named survived the testator, but two of them died before their mother, and the court held that the fee of the premises vested upon the testator's death in the four children. In discussing the meaning of the words "or heirs," the court said: "It is also urged by the appellant's counsel that the words 'or their heirs' in the clause of the will under consideration disclose the intent to substitute a deceased son's issue for the son himself in case the latter died at any time before the widow.

"It is difficult to say what was in the mind of this illiterate testator when he employed these words; he may have improperly deemed them essential in framing an absolute devise to the sons."

"It is quite inconceivable that he supposed the words created a substitutionary bequest or devise in the event of the death of a son before his mother, but it may more reasonably be assumed they were ignorantly used; it is a case where the court might well substitute 'and' for 'or.' Roome v. Phillips, 24 N. Y. 463; Jackson v. Blanshan, 6 Johns. 56.

"If these words are given the full force and effect claimed for them, they would fall within the rule of construction that where there is a devise to one person in fee, and in case of his death to another, the contingency referred to is the death of the first-named devisee during the lifetime of the testator, and that if such devisee survives the testator, he takes an absolute fee." Stokes v. Weston, 142 N. Y. 433, and cases cited.

In Davidson v. Jones, *supra,* the will there under consideration, devised all of testator's property to his wife, "for her sole and separate use for and during the term of her natural life, and on her decease to her children or to their legal representatives."

It was there contended that the words "or their legal representatives" were words of substitution and postponed

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the vesting of the remainders by creating remainders in the heirs of such of the testator's children as should die during the life of the life tenant, who was still living.

It was held by the court: "That though the remaindermen took possession 'on her decease,' meaning the life tenant's decease, such words as 'on,' 'when,' 'after,' and 'from and after,' standing alone do not of themselves make a remainder contingent unless their meaning is enlarged by the context. They relate to the time of enjoyment and not to the time the interest vests, for the law favors the vesting of estates. That though the words 'legal representatives' refer technically to executors or administrators, yet they may also mean heirs at law or next of kin, and where used in reference to real estate, they mean 'heirs of the testator's deceased children;' that the intent of the testator was to vest the absolute title to his real estate in such of his children as were living at the time of his death, and in the heirs of such as may have died before that event, and that only the time of enjoyment was postponed until the death of the widow; that as none of the children of the testator had died before him, that the remainder vested absolutely in them, and that a conveyance by them conveyed the title."

In that case, the words that raised the principal question were the words "or to their legal representatives," and the court held that they meant "to their heirs."

From the cases cited or referred to, or mentioned in the cases cited, we are satisfied that the words "or heirs" meant "next of kin," and that they were not words of substitution; and that, Frank Swarthout having survived the testator, the said remainder vested immediately and absolutely in her at the time of the testator's death, subject to the contingency of William J. Lazear, 2d, having children, which now is immaterial, as that contingency never occurred.

Therefore, we must hold that the said remainder did not pass to Eli Allison upon the death of Frank Swarthout and, therefore, Charles S. Allison, as administrator, has no interest in said remainder; and we must hold that the remainder vested in Mrs. Frank Swarthout, and that she had a right

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to will the same, and that she did will the same to Minor E. Swarthout, and he, as her executor, is entitled to the payment of the principal of said remainder to him. However, the said payment to him must be subject to so much of the trust as still exists in favor of Cornelius G. Lazear, and here is a question that would be troublesome if it were not for the consent of the parties. The will provided that the interest of said fund should be collected and paid annually; one-fifth to Cornelius G. Lazear and four-fifths to William J. Lazear, 2d, and, at the death of Cornelius G. Lazear, the whole of said interest should be paid to William J. Lazear, 2d, and at his death the principal should be paid to the children of said William J. Lazear, 2d, if he should have any, if not to Frank Swarthout, or her heirs. It is evident that the testator contemplated that Cornelius G. Lazear would die before the grandson, William J. Lazear, 2d, and it evidently did not occur to him that Cornelius G. Lazear would survive the grandson. But, from a reading of the will, it is evident that he intended, in any event, that Cornelius G. Lazear should have annually one-fifth of the interest of said fund, so long as he lived, whether he did or did not survive the grandson; and the question now is, shall all of the said fund be retained by the trustee, or whoever may be appointed to fill the vacancy, until the death of Cornelius G. Lazear, during which time to pay over one-fifth to Cornelius G. Lazear and four-fifths to the party entitled to the principal of the said trust fund until the death of said Cornelius G. Lazear, then to pay over the principal to the party so entitled; or shall one-fifth of the principal be held by the trustee, and the interest thereon collected and paid over annually to Cornelius G. Lazear, so long as he may live, and the four-fifths of said principal be immediately paid to the party entitled, Minor E. Swarthout, as executor, etc., and then, upon the death of Cornelius G. Lazear, the other one-fifth of said principal be paid to the said Swarthout as executor.

The parties to this proceeding have all appeared, all being of full age, and they have consented that the court construe this clause of the will that four-fifths of the principal shall

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be paid over to the party held to be entitled, and that one-fifth of said principal shall be held in trust, under said will, and the income thereof paid annually to Cornelius G. Lazear, during his lifetime; and, upon his death, the said trust in said one-fifth of principal to cease, and the said one-fifth of principal then to be paid to the party entitled.

Let a decree be made upon this judicial settlement, providing and adjudging among other things, that four-fifths of the principal of said fund, less its share of the commissions, expenses and allowances, be distributed and paid to Minor E. Swarthout, as executor of the last will and testament of Frank Swarthout, deceased; and providing that one-fifth of the principal of said remainder, less commissions, expenses and allowances, be paid over to such person as shall be appointed trustee under the last will and testament of William J. Lazear, deceased, and be held in trust by such trustee, under said will, and be kept invested and the interest collected and paid over annually to Cornelius G. Lazear, during his lifetime, and, upon his death, the said one-fifth of said principal be distributed and paid to Minor E. Swarthout, as such executor.

The question of costs and allowances to be heard on at least five days' notice from the moving party to those interested.

Decreed accordingly.

Matter of the Final Judicial Settlement of the Accounts of JOHN H. WILSON, as Testamentary Trustee under the last Will and Testament of DANIEL LEWIS, Deceased.

(Surrogate's Court, Madison County, February, 1907.)

Wills — Interpretation and construction; Designations and descriptions of persons, etc. — Rules and implications — Limitations upon death — Time referred to — Heirs; Terms defining the nature and quality of estates or interests — Future interests and vesting — Direction to convey, etc. at future time.

Where a testator, after directing his executors to set apart and invest a specific sum in trust for the life use of a certain person and to pay the income to her annually after two years from his

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decease, directs the payment of the principal of the trust fund at her decease to the heirs of his body then surviving in equal shares, and he is survived by two daughters, the title to the trust fund does not vest until the death of the *cestui que trust*.

Only one of testator's daughters having survived the *cestui que trust* she is entitled to one-half of the trust fund; and the son and granddaughter of a daughter of the testator who died before the *cestui que trust* are entitled, as living heirs of the testator, to the remaining one-half of the trust fund and the accumulated interest thereon in equal shares.

PROCEEDINGS for the final and judicial settlement of the accounts of an administrator with the will annexed.

S. M. Wing, for administrator with the will annexed.

Heard & Hamilton, for Martin G. Lamb and Laura J. Lamb, Jr.

Albert E. Campbell, for Charles Austin individually and as executor, etc., of his wife, Jennie Austin.

KILEY, S. This is a proceeding for the final and judicial settlement of the accounts of John H. Wilson, as administrator with the will annexed of Daniel Lewis, deceased.

Daniel H. Lewis died on the 23d day of February, 1872, in the county of Madison, N. Y., leaving a last will and testament and codicils thereto, in and by which he nominated and appointed Thomas Barlow and Israel Spencer executors thereof. Said will was duly admitted to probate and said executors qualified thereunder. Previous to the 24th day of November, 1900, the said executors died leaving the trust created by the will of Daniel Lewis still unexecuted; and, on the day last aforesaid, the petitioner in these proceedings, John H. Wilson, was duly appointed administrator with the will annexed, duly qualified thereunder and entered upon the discharge of his duties as such.

The controversy is raised by the presentation of the petition of the petitioner, and by the objections filed to the prayer of the petition by attorneys Heard & Hamilton, for Martin G. Lamb and Laura J. Lamb, Jr., and the interpleader of Charles Austin through his attorney, Albert E. Campbell, who make adverse claims to the moneys now in

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the hands of the petitioner and administrator with the will annexed, to wit: The sum of five hundred fourteen and 50/100 dollars ($514.50).

The petitioner alleges that he has it in his hands as administrator with the will annexed of Daniel Lewis, deceased. Martin G. Lamb and Laura J. Lamb claim that it belongs to them as living heirs of Daniel Lewis, deceased, and the said Charles Austin claims that it first passes to him as the executor of the estate of Jennie Austin, who was his wife, and of whose will he is executor, and who is a deceased granddaughter of Daniel Lewis, deceased.

Where this money should finally go must be determined by the seventh codicil of the will of Daniel Lewis, deceased, which codicil creates the only trust under said will or codicils now unexecuted and which reads as follows: "I will and direct that my executors set apart in trust and safely invest one thousand dollars ($1,000.00) to and for the use of Mrs. Mehitable Bowen, for and during her natural life, the interest thereof to be paid to her annually after two years from my decease; that on her decease I will and direct that my said one thousand dollars ($1,000.00) be paid to the heirs of my body then surviving, they to share alike."

At the time of the decease of Daniel Lewis, there survived him, as his heirs at law and next of kin, two daughters, Elvira Wilson and Laura J. Lamb. Had they survived the *cestui que trust,* Mehitable Bowen, there would be no question as to the final disposition of the trust fund set apart under the seventh codicil of the will of said deceased. Said Mehitable Bowen, the *cestui que trust,* named in the seventh codicil of the will of said testator, Daniel Lewis, died May 8, 1906; and, at the time of her death, Laura J. Lamb, the daughter of Daniel Lewis, had died, and left her surviving the said Martin G. Lamb, her son, her daughter, Jennie Austin, and this granddaughter, the said Laura J. Lamb, Jr. Mrs. Austin, however, died before Mehitable Bowen; and the only question presented was whether Mrs. Austin's estate shall take any portion of the one-half of the trust fund that would have passed to Laura J. Lamb if she had survived Mehitable Bowen.

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Charles Austin aforesaid urges that the money belonged to the estate of the deceased daughter, Laura J. Lamb, of Daniel Lewis, deceased, and that circumstances transpiring after the death of Daniel Lewis, deceased, of which evidence was given or stipulated upon this trial, require that this codicil should be so construed that this money should be paid to the estate of Laura J. Lamb, deceased. The circumstance referred to is that Elvira Wilson and Laura J. Lamb gave separate mortgages, upon real estate owned by them, for five hundred dollars ($500) each, to secure the payment of the income of the one thousand dollars ($1,000) to Mehitable Bowen, the *cestui que trust,* named in the seventh codicil of the will in question. And he urges that, in construing this portion of the will of said testator, these circumstances should be taken into account by the court and that they point to the construction sought by Mr. Austin.

In the construction of the will we are not permitted to go outside the will, unless the language used by the testator is ambiguous; and, while we are required to give force and effect to his intention, we have to gather that intention from the will itself, if that can be done. This clause quoted above from the seventh codicil of this will is clear, definite and not ambiguous. If the testator had intended that the estate of either one of his daughters should take a portion of this trust fund providing they died before the *cestui que trust,* Mehitable Bowen, named in the codicil, then and in that event he would have named his daughters as such beneficiaries, and by the statute of wills their respective shares of said trust fund would have passed to their estate and thence to their heirs; but here the testator makes his meaning entirely clear, he says, "be paid to the heirs of my body then surviving, they to share alike." The heirs of the testator were determinable at his death, yet the gift to them was not, by the terms of the will, to vest in possession until after the termination of the trust created for the benefit of Mehitable Bowen. That was the time, fixed under the seventh codicil of his will, that this particular gift should take effect; and it was not until the death of Mehitable Bowen that the persons could be ascertained who would be the heirs

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of the body, then surviving, of Daniel Lewis. The title to this trust fund did not vest until the death of Mehitable Bowen.

Mrs. Wilson, surviving Mehitable Bowen, received, as she had a right to, one-half of the trust fund; and the remaining heirs of the body of Daniel Lewis living at the time of the death of Mehitable Bowen, who were Martin G. Lamb and Laura J. Lamb, Jr., aforesaid, are now entitled to receive the other one-half of said trust fund and any additions of interest which it has earned to be added thereto. Bisson v. West Shore R. Co., 143 N. Y. 125; Tedd v. Morton, 60 id. 502; Stevenson v. Lesley, 70 id. 512.

No agreement, made subsequently to the death of Daniel Lewis by his heirs living at the time of his decease and before the death of Mehitable Bowen, could bind or cut off the interest of those who were living at the time of the decease of Mehitable Bowen, unless they were parties to that instrument. It is not claimed upon this hearing that either the said Martin G. Lamb or Laura J. Lamb, Jr., was a party to any agreement that cut off their rights under the will of Daniel Lewis, deceased, if they were the heirs of his body at the time of the decease of Mehitable Bowen.

I hold that Martin G. Lamb and Laura J. Lamb, Jr., each takes one-half of the money arising from said trust fund now in the hands of the administrator with the will annexed of Daniel Lewis, deceased, to wit: The sum of five hundred dollars with any accrued interest, subject to the costs and expenses of this proceeding and the commissions of said administrator with the will annexed.

S. M. Wing, attorney for the administrator with the will annexed, is allowed thirty-five dollars for his services and disbursements in these proceedings.

Heard & Hamilton, attorneys for Martin G. Lamb and Laura J. Lamb, Jr., are allowed a like amount and in addition thereto twenty-two dollars and forty-eight cents disbursements, and let a decree be prepared accordingly.

Decreed accordingly.

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Matter of the Judicial Settlement of the Account of JAMES GILLROY, as Trustee of JOHN GILLROY, Deceased.

(Surrogate's Court, New York County, February, 1907.)

Former adjudication — Who are concluded — Persons acting in particular capacity.

Where a testamentary trustee brings an action in the Supreme Court in the interest of the estate and judgment is obtained by the defendant because, as to an alleged statement of an account, he is believed against the plaintiff, the judgment is not binding as an estoppel against the trustee on an issue as to his good faith in his dealings as trustee upon the judicial settlement of his accounts as trustee.

PROCEEDING upon the judicial settlement of the accounts of a trustee.

D. E. & J. F. Lynch, for trustee.

Campora & Thiery, for legatees.

Wessels Ryerson, special guardian.

THOMAS, S. A trustee does not become liable to his beneficiaries merely because an adverse decision is rendered against him in an action brought by him in the interest of the estate, but only when it is shown by competent evidence that he has suffered such defeat by his own fraud, collusion or gross negligence. The judgment in the Supreme Court action was obtained because the defendant in that action was believed by the referee in opposition to the oath of the trustee as to an alleged statement of an account. The judgment thus rendered is not binding as an estoppel between the trustee and his beneficiaries on an issue as to his good faith in his dealings as trustee, and the testimony given against him in that action is, for the purposes of the present proceeding, mere hearsay. The objection as to the $401 item is overruled.

Decreed accordingly.

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Matter of the Estate of GEORGE J. WEAVER, Deceased.

(Surrogate's Court, New York County, February, 1907.)

Executors and administrators — Articles set apart and sustenance for survivor and children — Money in lieu of articles specified in subdivisions 3 and 4 of section 2713 of the Code of Civil Procedure, when not allowed.

Where payments to a widow of $400, for mourning apparel and sustenance, and $150, under subdivision 5 of section 2713 of the Code of Civil Procedure, have been credited to the executor in his accounts, the payment of $300 to her in lieu of articles specified in subdivisions 3 and 4 of said section will be disallowed.

Where articles of copartnership provide that the firm shall continue for sixty days after the death of any partner and a partner who contributed no capital to the firm and had no capital account on its books but was allowed interest on his seat in a stock exchange, died, profits of the firm during such period of sixty days after his death are income and not principal and pass to his widow as the life beneficiary of his residuary estate.

PROCEEDINGS upon the judicial settlement of the account of an executor.

Under the will of the testator all his residuary estate was left in trust, the income to go to his wife for life, with provision for the distribution of the principal after her death.

The executor paid to the widow sums aggregating $850, as follows:

Mourning apparel	$200
Widow's sustenance	200
In lieu of articles mentioned in section 2713, subdivision 3, Code of Civil Procedure	150
Subdivision 4	150
Subdivision 5	150

These payments were objected to by the trustee and the special guardian, although it was admitted that, if any pay-

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ments for these items were proper, the amounts were not excessive.

At his death the testator was the owner of a seat in the New York Stock Exchange and was a member of a stock exchange firm. The decedent contributed no capital to the firm and had no capital account on the books of the firm. He was allowed interest on his seat at a fixed valuation. Under the articles of copartnership the firm was to continue for sixty days after the death of any partner. The firm so continued after the death of the testator and the profits of the firm during this period, to which decedent would have been entitled if living, amounted to $5,569.75, part of which the executor paid to the widow. The question was raised by objections to the account as to whether this sum should go to the widow as income or to the trustee as capital.

Charles Henry Phelps, trustee, appearing personally.

John P. East, for executor.

Grattan Colvin, for widow, Florence H. Weaver.

Junius Pendleton Wilson, special guardian for infant, George L. Weaver.

THOMAS, S. Out of the $850 paid by the executor for the use of the widow he will be credited $550; and the sum of $150 in lieu of articles specified in subdivision 3 and $150 in lieu of articles specified in subdivision 4, respectively, of section 2713, Code of Civil Procedure, will be disallowed.

The amount received from decedent's firm, pursuant to the articles of copartnership, as the share of profits due to the decedent, will be treated as income and not as principal, and payments thereout already made by the executor will be sustained, and the balance of the income will be, by the decree to be entered, directed to be paid over to the trustee and by him paid to the widow as income. Tax costs and settle decree on notice.

Decreed accordingly.

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THE M. FINE REALTY COMPANY, Appellant, v. THE CITY OF NEW YORK, Respondent.

(Supreme Court, Appellate Term, March, 1907.)

Landlord and tenant — Termination of relation — Notice — Necessity — Sufficiency.

Under a lease for five years, terminable by either party at the expiration of one year on sixty days' notice in writing, such notice must be given within sixty days of the expiration of the first year.

APPEAL by the landlord from a final order of the Municipal Court of the city of New York, borough of Manhattan, in summary proceedings upon the submission of an agreed state of facts.

Eisman & Levy, for appellant.

William B. Ellison, Corporation Counsel (Theodore Connoly and Thomas Noonan, of counsel), for respondent.

HENDRICK, J. On the 11th day of February, 1903, a lease was executed between G. C. St. John, as executor, etc., as landlord, and the city of New York (acting through its street cleaning commissioner) as tenant, of a plot of ground on the north side of One Hundred and Sixteenth street in the borough of Manhattan. This lease was entered into under the authority of section 541 of the Greater New York charter, which authorizes the commissioner of street cleaning to enter into the lease on behalf of the city, with the consent and approval of the commissioners of the sinking fund. The commissioners of the sinking fund, by resolution adopted October 22, 1902, consented to the execution of the lease to the street cleaning commissioner by the estate of William C. Andrews, with a privilege of either party to terminate the lease at the expiration of one year, on sixty days' notice in writing. The lease in question was to commence on October 1, 1902, and continue until October 1,

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1907. It contained the following clause "with the privilege, however, to either party to terminate the lease at the expiration of one year on sixty (60) days' notice in writing." This clause was contained in the resolution of the commissioners of the sinking fund, which authorized the making of the lease. On October 25, 1905, G. C. St. John, as executor of the estate of W. C. Andrews, deceased, conveyed the premises described in the lease to one David G. Ludins. The next day, on October 26, 1905, and three years after the commencement of the term, said David G. Ludins notified the city of New York in writing that he desired to terminate the lease within sixty days from that date. Thereafter, on November 9, 1905, the said David G. Ludins conveyed the premises to the M. Fine Realty Company, the petitioner herein. Under the terms of the lease the tenancy began on the 1st day of October, 1902, and will expire on the 1st day of October, 1907, although the lease was formally executed between the parties and delivered on February 11, 1903. The only question to be determined in this case is the meaning under this statement of facts of the clause contained in the lease "with the privilege, however, to either party to terminate the lease at the expiration of one year on sixty (60) days' notice in writing." This clause undoubtedly means at the expiration of one year from the commencement of the term provided by the lease, that is to say, one year from October 1, 1902. It is contended by the appellant that sixty days' notice could be given at the expiration of the one year, or at any time thereafter, and that the only restriction on the privilege reserved to the landlord to give the notice at any time was that it should not be given during the first year of the term. The phrase "at the expiration of one year" defines the limit of time. It marks the close of a period, not its beginning, as said in Ferree v. M. O. H. Coal Co., 29 Misc. Rep. 624. The appellant in his brief argues that it is impossible to determine from what date the year was to begin, because, as he alleges in his brief, the lease does not fix any time when the year at the expiration of which the notice may be given begins to run, nor does the resolution of the commissioners of the sinking fund. The

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resolution was passed October 22, 1902, and the lease was formally entered into February 11, 1903, and so it is argued the 1st of October, 1903, would not be a year from either of these dates. The appellant loses sight apparently of the fact that the lease, although dated February 11, 1903, expressly states that the tenant is to have and to hold the premises "from the first day of October, 1902, for and during and until the full end and term of five years, thence and next ensuing and fully to be completed and ended," and that the resolution of the commissioners of the sinking fund approves the lease "for a term of five years from October 1, 1902, at an annual rental of twelve hundred ($1,200) dollars payable quarterly, with a privilege to either party to terminate the lease at the expiration of one year on sixty days' notice in writing." This resolution is embodied *in extenso* in the lease itself. It is also conceded that the city went into possession of the premises on October 1, 1902, although that fact is not material. Whatever date may be assigned by the appellant as the beginning of the year at the expiration of which the notice may be given is immaterial. It is conceded that more than one year, and, as a matter of fact, about three years, passed after any of the dates mentioned before the giving of the sixty days' notice to terminate the lease. Such notice was too late. Ferrée v. M. O. H. Coal Co., 29 Misc. Rep. 624. It is unnecessary to discuss whether or not the provisions as to the sixty days' notice constitutes a covenant running with the land.

The judgment should be affirmed, with costs.

Judgment affirmed, with costs.

GILDERSLEEVE and DAVIS, JJ., concur.

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JOSEPH A. SULLIVAN, Respondent, v. WILLIAM HYER HARNEY, Appellant.

(Supreme Court, Appellate Term, March, 1907.)

Process — Issuance and formal requisites — Attorney's office address — Addition of street number in city.

The omission of the street number from the address of plaintiff's attorney subscribed to a summons is not a jurisdictional defect but a mere irregularity; and where defendant, having actual knowledge of such office address, retains the summons, a motion to set aside service thereof and vacate the judgment entered in the action is properly denied.

APPEAL by the defendant from an order of the City Court of the city of New York denying defendant's motion to set aside the service of the summons herein, and to vacate the judgment herein.

Alexander Melhado (George Bell, on brief), for appellant.

Charles Cramer (Alois J. Keogh, of counsel), for respondent.

HENDRICK, J. The summons was subscribed with the name of the plaintiff's attorney, after which appeared the words "New York City." It did not contain "the street number or other suitable designation of the particular locality," as required by section 417 of the Code of Civil Procedure. The appellant contends that the omission of the street number rendered the summons absolutely void, and that no jurisdiction was acquired by the service of the summons upon the defendant. The summons filed with the judgment roll contains the office address of the plaintiff's attorney, which was omitted in the summons served upon the defendant. It further appears that the defendant had actual knowledge of the office address of the attorney for the plaintiff; and he retained the summons from the 17th

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day of May, 1906, to the 3d day of November, 1906, a period of almost six months. The omission of the street number does not constitute a jurisdictional defect. It is an irregularity. Wiggins v. Richmond, 58 How. Pr. 376; Hall v. Canandaigua Elec. Light Co., 55 App. Div. 598; Littauer v. Stern, 177 N. Y. 233.

The order appealed from should be affirmed, with costs.

GILDERSLEEVE and DAVIS, JJ., concur.

Order affirmed, with costs.

J. WALTER THOMPSON, Appellant, v. EDGAR E. YOUNG, Respondent.

(Supreme Court, Appellate Term, March, 1907.)

Pleading — Amendments — Amendments by leave of court — Subject matter of amendment — Defects amendable in general — New or different cause of action.

In an action upon an assigned claim for medical services rendered to defendant's mother at a sanatorium upon his request, the court may, under section 723 of the Code of Civil Procedure, allow the plaintiff to amend by changing the name of his assignor, without prejudice to the position of the case upon the calendar, where no change is made in the statement of the nature of the services, to whom rendered, and the time during which, the place where and the price at which such services were rendered.

APPEAL from an order of the City Court of the city of New York entered in the office of the clerk the 17th day of January, 1907, denying a motion of plaintiff to amend his complaint by changing the name of his assignor from Wallace E. Brown to Theresa E. Brown without prejudice to the position of the case upon the calendar.

Edwards & Bryan (E. H. Neary, Jr., of counsel), for appellant.

Gould & Wilkie (Learned Hand, of counsel), for respondent.

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GILDERSLEEVE, J. The action was commenced October 8, 1902, and answer was served October 30, 1902. The defendant set up a counterclaim sounding in tort; and, as the complaint was on contract, plaintiff demurred to the counterclaim on the ground that it could not be set up in this action, and the demurrer was overruled with leave to plaintiff to reply upon payment of twenty dollars costs, and the plaintiff paid same and served his reply December 6, 1904. On December 31, 1904, defendant amended his answer, but retained the counterclaim; and, on January 6, 1905, plaintiff replied to the amended answer, and the case was put on the calendar. On September 28, 1906, with the consent of plaintiff, the defendant served an amended answer, withdrawing the counterclaim and allegations of fraud, thereby substantially submitting to the demurrer which plaintiff had interposed to the counterclaim, and repaid plaintiff the twenty dollars which was paid by him for the privilege of replying. The defendant, therefore, was given the privilege of amending his answer without terms; and the amended answer set up, as a partial defense which had not theretofore been pleaded, that plaintiff's assignor, Wallace E. Brown, had been adjudicated a bankrupt and that substantially the whole of plaintiff's claim had been transferred to the trustee in bankruptcy by operation of law. The claim alleged in the complaint is for medical services rendered to the mother of defendant at his request from the 9th day of November, 1898, to and including the 16th day of January, 1900, at the Berkshire Hills sanatorium, at North Adams, Massachusetts, conducted by Drs. W. E. Brown & Son. Upon receiving the amended answer, plaintiff made investigations as to who composed "Drs. W. E. Brown & Son." All his transactions had been with Wallace E. Brown, M. D., and he had supposed, and so alleged in his complaint, that Dr. Brown was the owner of the sanatorium, and conducted same under the name "Drs. W. E. Brown & Son," and had supposed that Dr. Brown was the owner of the claim. The assignment of the claim to plaintiff is signed "Drs. W. E. Brown & Son" and was so signed by Dr. Wallace E. Brown. He then learned that Theresa E. Brown was the owner of the sanatorium, and was

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conducting the same under the name of "Drs. W. E. Brown & Son," pursuant to a married woman's certificate, as provided by the statutes of Massachusetts. Thereupon counsel requested defendant's attorneys for leave to amend the complaint according to the facts, which was refused; and this motion was then made. The application is under section 723 of the Code of Civil Procedure, which provides for amendments even upon the trial where the claim is not substantially changed. This statute reads as follows: "The court may, upon the trial, or at any other stage of the action, before or after judgment, in furtherance of justice, and on such terms as it deems just, amend any process, pleading or other proceeding, by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting an allegation material to the case; or, where the amendment does not change substantially the claim or defense, by conforming the pleading or other proceedings to the facts proved. And, in every stage of the action, the court must disregard an error or defect, in the pleadings or other proceedings, which does not affect the substantial rights of the adverse party. When amending a pleading or permitting the service of an amended or supplemental pleading in a case which is on the general calendar of issues of fact, the court may direct that the case retain the place upon such calendar which it occupied before the amendment or new pleading was allowed, and that the proceedings had upon the amended or supplemental pleadings shall not affect the place of the case upon such calendar, or render necessary the service of a new notice of trial." The amendment sought for does not change the claim. The claim as above stated is for medical services, rendered to the mother of defendant on defendant's request at the Berkshire Hills Sanatorium at North Adams, Massachusetts, conducted by Drs. W. E. Brown & Son, from the 9th day of November, 1898, to and including the 16th day of January, 1900. Whether the services sued for were rendered pursuant to a contract entered into between defendant and Theresa E. Brown, or between defendant and Wallace E. Brown, works no change whatever in

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the claim. The complaint states the nature of the services, to whom they were rendered, the time during which they were rendered, the place where they were rendered and the price at which they were rendered. These are the essentials of the claim, and no change whatever in the allegations of these elements of the claim is asked. The claim in the complaint as it stands and the claim in the proposed amended complaint are identical, the change being in the person from whom the plaintiff derives title. O'Neill v. N. Y. C. R. R. Co., 60 N. Y. 138–142. See also Boyd v. U. S. Mortgage Co., N. Y. L. J., Jan. 31, 1907. Deyo v. Morss, 144 N. Y. 216. It seems to us that the motion should have been granted upon reasonable terms.

The order is reversed and the motion granted, upon payment of taxable costs in the court below and the disbursements of this appeal.

No costs of this appeal to either party.

DAVIS and HENDRICK, JJ., concur.

Order reversed and motion granted upon payment of costs and disbursements. No costs of this appeal to either party.

MERRILL & BAKER, Respondent, *v.* HELENA WOOLWORTH, Appellant.

(Supreme Court, Appellate Term, March, 1907.

Discovery and inspection — Examination of party before trial — Right to remedy — Examination of defendant — When not allowed.

An examination of defendant before trial and after issue joined should be limited to the purpose of proving the plaintiff's case as alleged in the complaint and will not be allowed where it is apparent that the only object is to obtain information concerning facts upon which the defense is based or merely for the purpose of enabling plaintiff to prepare for trial.

APPEAL from order of the City Court of the city of New York, dated November 24, 1906, for the examination

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of defendant before trial; and from orders dated December 5 and December 13, 1906, denying defendant's motions to vacate and set aside said order of November 24, 1906.

Peck & McCann (Charles E. F. McCann, of counsel), for appellant.

George Zabriskie (Christopher B. Wyatt, of counsel), for respondent.

HENDRICK, J. The complaint in the action sets forth a specific agreement between the Grolier Society of New York, plaintiff's assignor, and Helena Woolworth, the defendant, for the purchase of a certain set of writings of Alexander Dumas. This agreement is specific in its terms, and upon it the plaintiff must stand or fall. The answer of the defendant admits that a contract was entered into between the parties mentioned, but denies that it was in the form set forth in the complaint. The affidavit upon which the plaintiff based the application for an examination of the defendant before trial states: "I may be surprised upon the trial by the production and proof of some other agreement, the performance of which I may, according to its terms, not be prepared to prove." The affidavit further states that the deponent is informed by his counsel that the examination of the defendant at this time is necessary in order to properly prepare the case for trial and to prevent surprise thereon. It would appear from an examination of all the papers on appeal that this is an effort to discover evidence to be adduced by the defendant on the trial in order to establish her defense to the allegations of the complaint. After issue is joined, an examination of the defendant before trial should be limited to the purpose of proving the plaintiff's case as set forth in his complaint. Such examinations are never allowed where the apparent and only object is to obtain information concerning facts upon which the defense is based. Neither are such examinations allowed merely for the purpose of enabling a party to prepare for trial. Dudley v.

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N. Y. Filter Mfg. Co., 80 App. Div. 164. The cases are many and uniform in holding this doctrine.

The orders of December 5, 1906, and of December 13, 1906, denying the motion to vacate the order directing examination, should be reversed; and the order dated November 24, 1906, directing the examination of the defendant before trial, should be vacated, with costs and disbursements, and with ten dollars costs on appeal to this court.

GILDERSLEEVE and DAVIS, JJ., concur.

HUGH HILL and EUGENE MINER TAYLOR, Copartners, Doing Business Under the Firm Name and Style of EDWARD HILL'S SON & COMPANY, Respondents, *v.* HENRY C. MULLER, Defendant, and CHARLES MULLER, Appellant.

(Supreme Court, Appellate Term, March, 1907.)

Motions and orders — Orders — Settling order — Destroying one of two different orders inadvertently signed but not entered and adopting the other.

Where, upon the affirmance of an interlocutory judgment overruling a demurrer, the plaintiffs enter a final judgment in the action, and, upon the granting of defendant's motion to vacate the same, both parties hand up proposed orders for signature and the judge inadvertently signs both and they are filed in the clerk's office without having been entered, and, thereafter, the justice, after examining both orders in the presence of plaintiffs' attorney and a representative of defendant's attorney, destroys defendant's order, a denial of defendant's motion to have filed and entered a copy of the destroyed order with the same legal effect as the original order is proper and the order entered thereon affecting no substantial right is not appealable.

Defendant could have made a motion to resettle the plaintiffs' order and if, by a denial of such motion, he was injured in a substantial right, he could have appealed from the order entered thereon.

APPEAL by the defendant Charles Muller from an order of the City Court of the city of New York.

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John Oscar Ball (A. P. Bachman, of counsel), for appellant.

Chester A. Bayles, for respondents.

HENDRICK, J. This is an appeal from an order of the City Court denying the defendant's motion to have a copy of a destroyed order, filed in the clerk's office of that court, in the place and with the same legal effect as the original order, which had been filed, but was destroyed under the following circumstances: The Appellate Term affirmed an interlocutory judgment overruling a demurrer, and by its first order failed to grant leave to the defendant to plead over. Subsequently the defendant, having moved for a resettlement of such order, the Appellate Term made an order granting leave to the defendant to plead over upon payment of the costs of the appeal and the costs in the court below within six days. It appears that the plaintiffs, after the affirmance of the judgment overruling the demurrer by the Appellate Term, had entered a final judgment in the action against the defendant; and this judgment the defendant, after the entry of the resettled order permitting the defendant to plead over, moved to vacate. This motion was granted, and both parties handed up orders for signature. By inadvertence the justice hearing the motion signed both orders and they were both filed in the clerk's office, but it does not appear that either order had been entered. The defendant's order, after reciting the preliminary facts, reads as follows: "It is ordered that the motion be and the same is hereby granted in all respects, that the final judgment * * * be and it hereby is vacated and that the clerk of this court be and he hereby is directed to mark on the judgment docket of this court that the aforesaid judgment is vacated by order of the court." The plaintiff's order, so far as we need consider it, reads as follows: "It is ordered, that the motion to vacate the final judgment * * * be and the same is hereby granted and the stay obtained by Chas. Muller be and the same is hereby vacated." The stay referred to in the order was one obtained by the

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defendant staying the plaintiff pending a motion made by the defendant in the Appellate Division for leave to appeal. After the orders were filed, the attention of the justice was called to the fact that he had signed two orders; and, as appears from the opposing affidavit used on the motion (which statement contained therein the court below had a right to believe), he then, in the presence of the plaintiffs' attorney and a representative from the defendant's attorney's office, sent for the two orders and, after examining them, declared that the plaintiffs' order was the proper order and that he never intended to sign the order proposed by the defendant, and thereupon destroyed the defendants' order and instructed the representatives of the parties there present to inform the clerk that he had so destroyed it. To this action it does not appear that the defendant's representative offered any protest or exception and the act of the justice was evidently done in perfect good faith, although the proper practice would have been to have made an order vacating the defendant's order. It will be observed that the two orders in their effect are substantially alike. The defendant's order, so far as it directs the clerk to vacate the judgment, contains the proper recitals and the plaintiffs' order is deficient in that respect; but we think there can be no question but that, under the recital in the plaintiffs' order, the clerk would have been justified in entering opposite the judgment on the docket of judgments, the words "vacated by order of the Court," upon request being made of him so to do. So far as the order of the plaintiffs vacating the stay is concerned, it is undoubtedly correct. We fail to see, therefore, how the denial of the defendant's motion to have filed and entered a copy of the destroyed order affects a substantial right of the defendant; and, unless it does so, it is not an appealable order. Code Civ. Pro. § 1342. The defendant had an ample remedy to correct the plaintiffs' order, if he so desired and considered it essential, by a motion to resettle the same; and, if such motion was denied, and the defendant was injured in a substantial right by such denial, an appeal would lie.

We think the order now appealed from, under the cir-

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cumstances shown by the recital, is not an appealable one; and the appeal must be dismissed, with ten dollars costs and disbursements.

GILDERSLEEVE and DAVIS, JJ., concur.

Appeal dismissed, with ten dollars costs and disbursements.

WILLIAM GUGGOLZ et al., Respondents, *v.* THE ARCH REALTY AND CONSTRUCTION COMPANY, Appellant.

(Supreme Court, Appellate Term, March, 1907.)

Municipal Courts — Procedure — Vacation of judgment — Opening default.

Where a case is ready upon the calendar and defendant's request for an adjournment is refused, and he suffers an inquest to be taken without further appearance, a judgment thus rendered is upon his default; and a motion to open the same, based upon an affidavit of merits and affidavits showing sufficient grounds, should be granted. A denial of the motion, not upon the merits but for want of power, is erroneous.

APPEAL by the defendant from an order of the Municipal Court of the city of New York, second district, borough of the Bronx.

Saitta & Thiele, for appellant.

Albert S. Oglesby, for respondents.

Per Curiam. This is an appeal from an order denying a motion to open the default of the defendant in failing to proceed with the trial of the case after the same had been reached. The court below denied the motion, not upon the merits, but solely, as stated in his order denying the same, upon the ground of want of power. In this the court below

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was clearly in error. There has been a failure to distinguish between the case of Lavenfeld v. Adler, 99 N. Y. Supp. 799 and cases like the case at bar, where the defendant is clearly in default and has a right to have it determined whether or not he is entitled to his day in court. In the Lavenfeld case the plaintiff appeared upon the adjourned day and asked for a further adjournment; this was refused, and the complaint dismissed; and, as Mr. Justice Leventritt very properly said, "The judgment of reversal was not the result of the non-appearance of the plaintiff". In that case there was nothing for the trial judge to do, having refused an adjournment, except to dismiss the complaint; and the plaintiff's remedy was either to sue again, or appeal from the judgment upon the ground that such adjournment was one to which he had a legal right. In the case at bar the defendant, it is true, appeared and asked for an adjournment, which was refused, and thereafter an inquest was taken, the judgment thus rendered being one rendered upon the defendant's default. The respondents' attorney alleges in his brief that the defendant's attorney remained in court during the inquest and, after its conclusion, moved for a stay of execution and therefore cannot be considered as having been in default. This does not appear by the record. One of the affiants states that he was informed by his clerk that a "few days' stay had been granted" and the affidavit of the clerk says that the court, after hearing the testimony of the plaintiff and his witnesses, gave a judgment for $468, and "at the same time saying that the execution be stayed for five days to enable us to make a motion"; and this statement is not disputed in the opposing affidavit. The proceedings and testimony taken upon the trial are not made a part of the return, and it nowhere appears in the record that the defendant in any way appeared after the refusal to grant the adjournment asked for but suffered an inquest to be taken. The moving affidavits, together with the affidavit of merits, presented sufficient grounds for opening the defendant's default, and the motion should have been granted.

Order reversed and new trial ordered, upon payment of ten dollars costs in the court below and the defendant stipu-

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lating that the judgment stand as security until the final determination of the action.

Present: GILDERSLEEVE, DAVIS and HENDRICK, JJ.

Order reversed and new trial ordered upon payment of ten dollars costs and defendant stipulating that judgment stand as security until final determination of action.

THE PIERCE, BUTLER & PIERCE MANUFACTURING COMPANY, Respondent, *v.* ISAAC KLEINFELD, ISAAC ROTHFELD and SAMUEL KESSLER, Appellants.

(Supreme Court, Appellate Term, March, 1907.)

Default — Right to take default — In general — At trial term not until cause reached on calendar.

Where, upon the day set for the trial of a case in the City Court of the city of New York, the trial justice had before him an unfinished case and another case ready for trial, which was tried, and defendants' counsel was actually engaged in the trial of a case in the Supreme Court, an inquest was improperly ordered; the case should have been marked "Ready" and an inquest should not have been ordered until the case was actually reached for trial.

APPEAL by the defendants from an order entered in the City Court of the city of New York, granting a motion made by defendants to be relieved from a default made by the defendants at the time when the case was called for trial.

Abraham E. Schleimer, for appellants.

Pressinger & Newcombe, for respondent.

Per Curiam. The case appeared on the day calendar for trial on Friday, January 11, 1907, when the trial judge granted an adjournment at the request of defendants' attorney, until Monday, January fourteenth, stating at the

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time that "the case would not again be passed and that the defendants must be ready for trial on the following Monday, and that, if Mr. Schleimer's (defendants' attorney) engagements were such that he would be unable to attend, the defendants must procure other counsel to try the case," etc. On the following Monday there was an unfinished case on trial, and there was also ready for trial another case which took the whole of Monday in trial. It is shown by the moving papers that, on Monday, defendants' attorney was actually engaged in the trial of a case in the Supreme Court in Brooklyn. In view of the fact that the court had before it an unfinished case, and another case ready for trial, which was actually tried, and of the fact that the defendants' counsel was actually engaged in a trial in the Supreme Court, the case should have been marked "Ready" and a default ordered when the cause was actually called for trial, if the defendants were not ready to proceed at that time. In McEwen v. Dimond, 81 App. Div. 626, and Goodness v. Metropolitan St. R. Co., 49 App. Div. 76, 77, the facts are not the same as in this case. In the latter the case appeared on the day calendar for trial on January eighth, and was adjourned, from day to day, on account of the engagement of the plaintiff's counsel, until January nineteenth, and, during that time, the plaintiff's counsel, on account of whose engagement the case was postponed, tried three other cases. The counsel then went into the trial of other cases, notwithstanding that this case had been held on account of his engagements. In the former, the case before the one in which default was taken, and which was thought to be ready for trial and would be tried, was not tried, and the case in which default was taken stood next upon the calendar, and was immediately reached. The trial court insisted that it should either be tried or go over the term; and the plaintiff, having no other alternative, took an inquest. In view of all the circumstances disclosed by the printed papers on appeal, the inquest should not have been ordered until the case was actually reached for trial, and the defendants defaulted.

The order of January 17, 1907, granting the motion made by the defendants to be relieved from the default, should be

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modified by striking out so much thereof as allows costs to the plaintiff and, as thus modified, affirmed, without costs in this court to either of the parties.

Present: GILDERSLEEVE, DAVIS and HENDRICK, JJ.

Order modified and, as modified, affirmed, without costs in this court to either party.

HUGH HILL and EUGENE MINER TAYLOR, Copartners, Doing Business Under the Firm Name and Style of EDWARD HILL'S SON & COMPANY, Respondents, *v.* HENRY C. MULLER, Defendant, and CHARLES MULLER, Appellant.

(Supreme Court, Appellate Term, March, 1907.)

Costs: **Amount — Allowances on motions and interlocutory proceedings — Argument of demurrer; Payment and enforcement thereof — Staying further proceedings in actions till costs paid — Waiver of stay.**

A defendant, by serving a notice of argument of an appeal from an order denying his motion to retax costs on an appeal, waives a stay because of plaintiff's non-payment of costs of a motion.

Where, upon the affirmance of a judgment overruling defendant's demurrer, he is granted leave to withdraw it and plead over upon payment of costs "in this court and the court below", the clerk of the court below has no authority to refuse to tax the costs as directed by such order; and defendant, on an appeal from an order denying his motion for a retaxation of costs, may not object to the allowance of the costs upon the appeal because plaintiffs served no notice of argument and made no oral argument nor submitted a brief. Such objection should have been made to the appellate court on motion to resettle the order.

Where, upon the entry of an interlocutory judgment overruling a demurrer, the defeated party is allowed to plead over on payment of costs, the successful party is entitled to tax costs after notice and before trial and a trial fee and disbursements, but not costs before notice of trial.

Costs subsequently imposed upon a motion made for a reargument of the appeal are improperly taxed, as they form no part of the costs referred to in the order affirming the judgment.

Costs which were or should have been taxed on the entry of the interlocutory judgment in the court below are not properly taxable under the order of the Appellate Term.

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An item of costs for service of the summons and complaint, being taxable upon entry of the final judgment, is not properly taxable under the order of the Appellate Term and should have been disallowed.

APPEAL by the defendant Charles Muller from an order entered in the City Court of the city of New York, denying appellant's motion to retax costs on appeal.

John Oscar Ball (A. P. Bachman, of counsel), for appellant.

Chester A. Bayles, for respondents.

HENDRICK, J. This is an appeal from an order denying defendant's motion to retax the costs upon an appeal taken from a judgment of the City Court overruling the defendant's demurrer, which judgment was affirmed by the Appellate Term. The order of the Appellate Term affirmed the judgment of the City Court and granted leave to the defendant to withdraw his demurrer and plead over within six days upon payment of the costs "in this Court and the Court below." Thereupon the plaintiff served a bill of costs and gave notice of taxation thereof. Upon such taxation the defendant appeared and objected to several of the items some of which were allowed and some disallowed. Subsequently, the defendant moved for a retaxation and, upon such motion, asked to have disallowed the following items:

Costs before notice of trial	$25
Motion costs	10
Costs on demurrer	20
Costs on affirmance	40
Serving summons and complaint	2

The defendant's objections to the taxation of the foregoing items are: First. That the plaintiffs are stayed by an order entered on September 25, 1906, which awarded the defendant ten dollars costs against the plaintiffs which costs the defendant avers have never been paid. The order of

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the Appellate Term was made on November 14, 1906. The case appeared upon the October, 1906, calendar and was noticed for argument by the defendant. By thus serving a notice of argument he waived any stay then existing. Reeder v. Lockwood, 30 Misc. Rep. 532. The defendant also objects to such taxation of costs upon the ground that the plaintiffs are not entitled thereto for the reason that they served no notice of argument of the appeal, and did not argue said appeal orally or submit any brief thereon. This objection could only apply to the costs of such appeal, and the defendant's objection to the allowance of costs upon appeal should have been made to the Appellate Term on a motion for resettlement of the order. The clerk of the City Court was required to carry out the order of the Appellate Term and had no authority to refuse to tax the costs as directed by such order. The item of "Costs before notice of trial, twenty-five dollars," was improperly allowed. Where upon the entry of an interlocutory judgment a defeated party is allowed to plead over upon the payment of costs, the successful party is entitled to tax costs after notice and before trial and a trial fee and disbursements. Garrett v. Wood, 61 App. Div. 294. "Motion costs, ten dollars" is also an improper item. They were costs subsequently imposed upon a motion made for a re-argument and form no part of the costs referred to in the order affirming the judgment. The item of "Costs on demurrer, twenty-dollars," evidently refers to the costs which were or should have been taxed on the entry of the interlocutory judgment in the court below and therefore are not properly taxable now. Costs of two dollars for serving summons and complaint are taxable upon entry of the final judgment and are not properly taxable under the order and should have been disallowed. The item of forty dollars on affirmance was evidently intended to be forty dollars for argument on appeal and may be so considered and the defendant had the right to tax that item (Campbell v. Hallihan, 46 Misc. Rep. 409), under the order of the Appellate Term.

The order taxing the costs in the Court below is modified by striking therefrom the following items: Costs before

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notice of trial, twenty-five dollars; motion costs, ten dollars; costs on demurrer, twenty dollars; serving summons and complaint, two dollars, and allowing the other items objected to, and, as modified, affirmed, without costs of this appeal to either party.

GILDERSLEEVE and DAVIS, JJ., concur.

Order modified and, as modified, affirmed without costs of this appeal to either party.

WILLIAM M. ROSENTHAL, Appellant, *v.* THE BELL REALTY COMPANY, Respondent.

(Supreme Court, Appellate Term, March, 1907.)

New trial: Right to remedy in general — Discretion of court; Grounds — Newly discovered evidence — Nature and sufficiency of evidence discovered; Proceedings to procure new trial — Bill of exceptions, case, or statement of facts — Necessity for case.

Where, upon the trial of an action for work, labor and services and materials furnished, defendant claims that the work was ordered through a third person who had been paid in full but who was not sworn upon the trial, and who, plaintiff claims, was simply his agent without authority to receive payment; and where, upon defendant's motion for a new trial on the ground of newly discovered evidence, defendant excuses the absence of the third person whose affidavit used on the motion shows that he secured the order from the defendant; that he bought the material and did the work in connection with the plaintiff and was financially interested in the transaction, and paid the plaintiff for the materials furnished and work and received a receipted bill which was turned over to defendant, the materiality of the testimony is apparent; and its probative force can be much better determined by a trial court than by a reading of the affidavits; and the motion for a new trial should be granted.

A motion for a new trial on the ground of newly discovered evidence may be made, in the absence of objection, upon the pleadings and affidavits; and an objection that a settled case is necessary under section 997 of the Code of Civil Procedure cannot be raised for the first time upon appeal from the order entered on such motion.

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In the absence of an apparent abuse, the discretion of the court in granting a motion for a new trial on the ground of newly discovered evidence will not be disturbed.

APPEAL by the plaintiff from an order of the Municipal Court of the city of New York, seventh district, borough of Manhattan, granting a new trial on the ground of newly discovered evidence.

Marks & Marks, for appellant.

Bennett E. Siegelstein, for respondent.

HENDRICK, J. The action was for work, labor and services and material furnished. It was claimed by the defendant on the trial that the work was ordered through one Max Cohen, and that the defendant had paid said Max Cohen in full therefor, and in substance that there were no contractural relations known to defendant between the plaintiff and defendant. The plaintiff, on the other hand, claimed that Max Cohen was the plaintiff's agent simply, and that he had no authority to receive payment for the work, labor and services and materials rendered. Max Cohen was not a witness on the trial, and the affidavits upon which the motion for a new trial was based excuse his absence. Cohen's own affidavit used on the motion for a new trial shows that he was an important and material witness for the defendant. He states that he secured the order from the defendant; that he bought the material and did the work in connection with the plaintiff, and was financially interested in the transaction, and that the plaintiff was to receive only a commission; that he received payment for the goods and paid the plaintiff for the material furnished, whereupon he received a receipted bill which was turned over to the defendant. He also states that the plaintiff was paid for the material and work. The materiality of this testimony is apparent. Its probative force can be much better determined by a trial court than by the reading of affidavits. The appellant objects that the motion should have been denied in the absence of a settled

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case. This undoubtedly is the practice in the Supreme Court, but the proper place to make that objection (if it be a valid objection in the Municipal Court) was upon the argument of the motion. The objection is taken too late on appeal. The court has power to entertain and decide a motion for a new trial on the ground of newly discovered evidence upon the pleadings and affidavits, in the absence of a settled case, where no objection is made on the argument of the motion that a settled case is necessary under section 997 of the Code of Civil Procedure. Failing to object at that time, appellant waived the objection, and it cannot be raised for the first time upon the appeal. Russell v. Randall, 123 N. Y. 436; McIver v. Halen, 50 App. Div. 441; Bentleon v. Meier, 81 Hun, 162. It is also contended by the appellant that the defendant knew of the existence of the witness and of the relevancy of the alleged newly discovered evidence before the trial, and that, therefore, the motion should have been denied. The facts in relation thereto are in dispute; and, as these motions are largely addressed to the discretion of the justice hearing the motion, the exercise of that discretion will not be disturbed by an appellate tribunal unless there has been an apparent abuse of it which does not appear in this case.

We do not decide on this appeal whether or not a printed case is necessary in the Municipal Court upon which to base a motion for a new trial on the ground of newly discovered evidence, preferring to base our decision on the absence of a timely objection to the hearing of the motion on affidavits.

The order appealed from should be affirmed, with costs.

GILDERSLEEVE and DAVIS, JJ., concur.

Judgment affirmed, with costs.

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THOMAS SECKEL and J. LEO HONIGMAN, Doing Business Under the Firm Name and Style of SECKEL & KIERNAN, Respondents, v. ISABELLA E. TANGEMANN, Appellant.

(Supreme Court, Appellate Term, March, 1907.)

Service of papers — Manner of service — Service by mail — Time of service — Time to amend pleading not doubled by serving original by mail.

Service of an original answer by mail does not entitle the defendant to double time within which to serve an amended answer.

APPEAL by the defendant from a judgment of the City Court of the city of New York, entered in favor of the plaintiffs.

John W. Browne, for appellant.

Fromme Brothers, for respondents.

DAVIS, J. This action was brought to recover $1694.76 as balance due for goods sold and delivered. The summons and complaint were served September 25, 1906, and the answer was served by mail October 1, 1906. An amended answer was served by mail October 11, 1906; but the plaintiffs returned the amended answer as not having been served in time (six days). The defendant made a motion to compel plaintiffs to accept the amended answer, upon the ground that her service of the original answer by mail gave her double time to serve an amended answer. This motion was denied and the order was affirmed, without opinion, on appeal to the Appellate Term of this Court in December, 1906. The question of the *status* of this amended answer also came up on an appeal from an order made at plaintiffs' instance, placing the case on the short cause calendar. This appeal was heard at the November, 1906, term of this court, and the order was affirmed without opinion. On both appeals this court was of the opinion that the amended answer *had not* been served in time and that, therefore, a new

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note of issue and notice of trial were not required. The case came on for trial October 23, 1906. The defendant objected to the trial proceeding because there had been no notice of trial served and no note of issue filed since the service of the amended answer. This objection of the defendant was overruled and exception to the ruling was noted. In making this ruling the court evidently had in mind the two previous decisions of the same court (recently affirmed on appeal) to the effect that the amended answer had not been served in time. We refer to the order denying the motion to compel acceptance of the amended answer and to the order placing the case on the short cause calendar upon the issue raised by the original answer. The plaintiffs proved their case, the defendant putting in no testimony, and a verdict was directed in their favor. The defendant appeals from the judgment entered on this verdict. Although the defendant put in no testimony, she made specific and general objections to all of the testimony, on the ground that the case was not properly before the court because of lack of note of issue and notice of trial subsequent to the service of her amended answer. Her objections were all overruled and exception taken. After plaintiffs had rested, the defendant offered to prove the facts connected with her service of the amended answer. Her offer was rejected and exception taken. The amended answer was not made part of this record and its contents are not before the court. But whatever its contents, whether calling for a reply or not, it would not affect the question of its being served in time. We think the court was right in proceeding with the trial and in rejecting defendant's offer. Inasmuch as no opinion was written by this court on the two other appeals, it seems proper to state briefly its position on the question involved. The defendant claims to have doubled her time to serve the amended answer because she served her original answer by mail. It is claimed that sections 798 and 542 of the Code of Civil Precedure, when read together, give a defendant who has served an original answer by mail double time to serve an amended answer. Section 798 reads in part as follows: "Where it is prescribed in this act, or in the general rules

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of practice * * * that the adverse party has a specified time, after notice or service, within which to do an act; if service is made through the post office, the time so required or allowed is double the time specified." We have here a special provision for the benefit of the party served by mail whose time to answer a pleading so served might otherwise be cut down through delay in the mails. The privilege of mailing is met by the privilege of double time to answer the pleading served by mail. The necessity of some indulgence in the matter of time to the party served becomes apparent in view of the fact that the time to answer the pleading begins to run from the day of mailing, and not from the receipt of the paper mailed. Van Horne v. Montgomery, 5 How. Pr. 238; Schlesinger v. Borough Bank, 112 App. Div. 121, 126, 127. But the defendant contends that, having doubled the plaintiffs' time by mailing her amended answer, she thus doubles her own time to serve an amended answer. It is urged that such is the effect of section 542 of the Code. This section reads in part as follows: "Within twenty days after a pleading, or the answer, demurrer or reply thereto, is served, or at any time before the period for answering it expires, the pleading may be once amended by the party, of course, without costs and without prejudice to the proceedings already had." Defendant claims that plaintiffs' time to reply or demur to her answer had been lengthened to twelve days and that, as she served her amended answer on the eleventh day, she thus served it at "a time before the period for answering it expired." We think such a construction of these two sections is at variance with the intention of the Legislature as expressed in section 798. The main purpose of that section was to relieve a party served from being put to a disadvantage by the mailing of his opponent's pleading. Now if that opponent can double his own time, also, by simply mailing his pleading to his adversary, the equality established by section 798 is destroyed with the advantage again in favor of the mailing party. The whole purpose of the provision in section 798 is thus frustrated. In harmony with this view we find the case of Armstrong v. Phillips (60 Hun, 243), in which the

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court say: "The defendant had but twenty days in which to serve his amended answer as of course (Sec. 542). He could not, by serving his original answer by mail give himself double time in which to amend it. It was the adverse party, and not himself, who acquired double time." The same view was held by Mr. Throp who, in his note to section 798, says that a party cannot entitle himself to double time by serving his pleading in this way. There are other authorities setting forth views contrary to those expressed above. See Schlesinger v. Borough Bank, 112 App. Div. 121. Under the circumstances we have adopted the view that the amended answer in this case was not served in time and that the judgment appealed from should be affirmed, with costs.

GILDERSLEEVE and HENDRICK, J., concur.

Judgment affirmed, with costs.

EDWARD C. DIXON, Respondent, *v.* GUISEPPE CARRUCCI, Appellant.

(Supreme Court, Appellate Term, March, 1907.)

Municipal Courts: Procedure — Vacation of judgment; Review — Judgments and orders reviewable — Order opening default not reviewable.

The Municipal Court of the city of New York is not authorized to vacate and set aside a judgment rendered by it unless its order directs a new trial.

Where a second judgment by default, rendered in the Municipal Court of the city of New York, is vacated on defendant's motion and the case set down for trial and defendant appears specially and moves to dismiss the complaint and judgment is again taken upon his default, his appeal from the last judgment and from that portion of the order vacating the second judgment which set the cause down for trial must be dismissed.

APPEAL by the defendant from a judgment in favor of the plaintiff rendered in the Municipal Court of the city of New York, tenth district, borough of Manhattan.

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Bunnell & Bunnell, for appellant.

James I. Moore, for respondent.

GILDERSLEEVE, J. The defendant appealed from a judgment rendered in this action upon the ground that no personal service of the summons had ever been made upon him and that he had not appeared generally in the action. Munic. Ct. Act, § 311. That appeal was heard and it was held that the court below never obtained jurisdiction of the person of the defendant, but that, an attachment having been issued in the action and a levy made, jurisdiction was acquired over the property; and, as it further appeared that the plaintiff's proof of his cause of action was insufficient, the judgment was reversed and the case sent back for a new trial. 49 Misc. Rep. 222. Upon the new trial another inquest was taken and judgment again given in favor of the plaintiff. The defendant then made a motion to vacate and set aside the judgment. The motion was made upon several grounds, some of which seem to be substantially the same as were urged upon the appeal taken from the judgment first obtained by the plaintiff. 49 Misc. Rep. 222. The motion to vacate the judgment was granted and the case was set down for a trial. Upon the third trial the defendant appeared specially, for the purpose of moving to dismiss the complaint, but at no time appeared generally, and again an inquest was taken. From the last judgment and from that portion of the order vacating the second judgment which sets the cause down for a trial the defendant again appeals. The judgment appealed from having beeen taken upon default, no appeal lies therefrom. Brown v. Bouse, 43 Misc. Rep. 72. Subdivision 19 of section 1, authorizing the Municipal Court to vacate a judgment, etc., is qualified by sections 252 to 256, Municipal Court Act (Quinn v. Schneider, 50 Misc. Rep. 630); and the only authority given the Municipal Court to vacate judgments, etc., is conferred by these sections. In none of these sections is there any provision for the vacating and setting aside of a judgment, unless the order made shall contain a direction for a new trial. If,

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therefore, the motion in this case can be considered at all, it must be regarded as one made to open a default and an order granting the same is not appealable. Spiropulos v. Magnioni, 49 Misc. Rep. 90.

DAVIS and HENDRICK, JJ., concur.

Appeals dismissed with costs.

J. SIDNEY BERNSTEIN, Respondent, *v.* THE LISPENARD REALTY COMPANY, Appellant.

(Supreme Court, Appellate Term, March, 1907.)

Corporations — Mode of entering into obligations, etc. — Liability on implied contract.

Where a lawyer renders professional services, in a transaction relating to new interests which were coming into control of a corporation, upon the employment of one who assumed to act as its agent and with the knowledge of its officers and without objection on their part and without notice that the contract for his services is not recognized, and the corporation accepts the benefit of his services, it is liable therefor upon a *quantum meruit*.

APPEAL taken by the defendant from a judgment for $120.11 damages and costs, rendered after a trial in favor of the plaintiff in the Municipal Court of the city of New York, ninth district, borough of Manhattan, in an action for services rendered.

McKenna & Goodhue, for appellant.

J. Sidney Bernstein, in person, for respondent.

GILDERSLEEVE, J. The facts are substantially as follows, according to plaintiff's evidence, which the court was warranted in believing, viz.: The plaintiff is an attorney-at-law, and the services were rendered in a legal capacity. Sometime in December, 1905, Messrs. Wilson, Goss and Rieser decided to associate themselves for the purpose of acquiring unimproved real estate and of building apartment houses

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thereon. A Mr. Jencks, of No. 100 Broadway, who is a building loan man and the active head of the Commonwealth Mortgage Company, submitted to them a parcel of property situated on Riverside Drive, the title of which was in a corporation called the Lispenard Realty Company, composed apparently of three clerks in Mr. Jencks' office, and upon which the Commonwealth Mortgage Company held a standing mortgage of $75,000, and a building loan agreement and mortgage of $85,000, both put on just prior to June 30, 1905, the date when the new mortgage tax came into effect. He proposed that they should take over the stock of the Lispenard Realty Company, carrying with it the property in question, subject to the two mortgages, and that he would take back another building loan mortgage from the company for $15,000. The terms were agreed upon, but the details were left for subsequent arrangement. Mr. Rieser is a brother-in-law and a client of the plaintiff, and, as he testified, suggested to his associates the advisability of having an attorney represent the corporation in the transaction in question, and it was agreed between them that the plaintiff should be retained. Mr. Rieser so notified the plaintiff; and, by his direction, the plaintiff called on Mr. Jencks and Mr. Jencks' attorney, Mr. Wescott, who has offices with Mr. Jencks, and had several consultations with them as to the steps by which the deal could be consummated. On the 21st of December, 1905, the plaintiff met Messrs. Wilson, Goss and Rieser by appointment in Mr. Wescott's office, and consulted with them and advised them as to their interests in the transaction. He testifies that, among other things, he advised them that, inasmuch as the Lispenard Realty Company had no title insurance policy on the property in question, an examination should be made of the title before they took the stock of the company, and they agreed with him. Between December 22 and 30, 1905, the plaintiff had several conferences with Mr. Wescott. He testified that he examined the original incorporation papers of the Lispenard Realty Company; that he examined the abstract of title to the property; that in conjunction with Mr. Wescott an agreement was drawn between the Lispenard Realty

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Company, Messrs. Wilson, Rieser and Goss, and the Commonwealth Mortgage Company, and also another agreement modifying the building loan agreement then of record. He testified further that, in view of the fact that the standing motgage had only until June 30, 1906, to run, he insisted upon getting an agreement from the Commonwealth Mortgage Company extending it until April, 1907, and helped draw such an agreement. He examined the application and consent of the Lispenard Realty Company to increase its capital stock. He examined the bond and mortgage for $15,000 to be executed by the Lispenard Realty Company. He attended with Messrs. Wilson, Goss and Rieser on the 26th of December, 1905, and saw that all the papers were properly executed and delivered. He attended the meeting of directors of the corporation held that day, and superintended the orderly resignation of the old directors, Mr. Jencks' clerks, and the orderly election of Messrs. Wilson, Goss and Rieser as new directors in their respective places. He attended to the transfer of the certificates of stock to the new stockholders. He received for the company all the books and papers and the seal then in the custody of Mr. Jencks, and subsequently delivered them to the defendant at its offices. And lastly he drew in his own office the minutes of the meetings of the new directors of January 2d, January 23rd and February 7, 1906. The plaintiff testified further that, on the 26th day of December, 1905, after the new election of officers, he had a talk with Wilson, Goss and Rieser in regard to his bill for services, and that it was arranged that it should be paid out of the moneys that the company expected to get from the first installment of the building loan. In all of this he is substantially corroborated by Mr. Rieser and also by the circumstances of the case. Shortly after all these transactions the plaintiff rendered a bill to the company for one hundred and fifty ($150) dollars. No disclaimer was ever made, until Mr. Rieser had a dispute with Mr. Wilson, withdrew from the defendant company and sued the Calvert Construction Company, of which Wilson was an officer, the plaintiff acting as his attorney in the case. Upon these facts the Trial Court found

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for the plaintiff in the sum of one hundred ($100) dollars, and costs. From the above evidence it is clear that the plaintiff rendered substantial service, for which he is entitled to compensation. Defendant seems to contend that plaintiff came in as a volunteer and rendered such service gratuitously. This is highly improbable as plaintiff is a lawyer by profession, and the work done was in line with the work which gives him his livelihood. The plaintiff was first hired by Mr. Rieser, a promoter or an agent of the defendant corporation. Even though that act were beyond the limits of the agency, the corporation itself, with the knowledge and consent of its officers, has received and accepted the benefits of the services. The plaintiff was certainly not guilty of any fraud and he claims a *quantum meruit* for his services. Hence his claim is clearly within the authority of the case of Potter v. New York Infant Asylum, 44 Hun, 367. The plaintiff represented in the transaction not only the individuals, but the corporation. The individuals were agents for an existing corporation. The Lispenard Realty Company had been in existence for six months or more. New interests were coming into control and the plaintiff was looking after the corporation and its new interests. Where a person is employed for a corporation by persons assuming to act in its behalf, and renders services, with the knowledge of its officers, and without objection on their part, and without notice that the contract is not recognized, and the corporation accepts the benefits of the services, the corporation will be held to have sanctioned the contract and will be compelled to pay for the services. Fischer v. La Rue, 15 Barb. 323; Olcott v. Tioga R. Co., 27 N. Y. 546; Hooker v. Eagle Bank, 30 id. 83; Castle v. Lewis, 78 id. 131; Scott v. Middleton, U. & W. G. R. Co., 86 id. 200; Davies v. Harvey Steel Co., 6 App. Div. 166. Even if the corporation were not in existence at the time of the employment, and the three persons were not the agents of an existing corporation, but only promoters of a prospective corporation, the defendant corporation would seem to be liable, as it has been held that a preliminary agreement made by promoters, the promoters and incorporators being the same persons and

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the only stockholders of the corporation, is binding on the corporation. Burden v. Burden, 8 App. Div. 160.

We are of opinion that the judgment was right, and should be affirmed, with costs.

DAVIS, J., concurs; HENDRICK, J., taking no part.

Judgment affirmed, with costs.

WILLIAM KRAUSS and CHARLES SCHENK, Doing Business Under the Firm Name and Style of "EUREKA AUTOMOBILE STATION," Respondents, *v.* FRANK C. MERKLEE and FIDELITY AND DEPOSIT CO. OF MARYLAND, Appellants.

(Supreme Court, Appellate Term, March, 1907.)

Attachment — Liability on attachment bond or undertaking — In general — Liability on indemnity bond given to sheriff.

Municipal Courts — Procedure — Attachment — Application of §§ 1421–1425 of Code of Civil Procedure.

Where possession of an automobile attached by a city marshal as the property of the defendant is surrendered to third persons claiming it upon the execution and delivery of a bond to the marshal in form such as would be given to him by a plaintiff to protect the marshal in seizing, keeping or selling property at the instance of a plaintiff, and an execution against the defendant in the attachment suit is returned unsatisfied, the judgment creditors have no cause of action on the bond.

The provisions of the Code of Civil Procedure (§§ 1421–1425), relating to actions against public officers to recover a chattel levied upon or damages resulting from levies or sales, do not apply to such a case.

APPEAL by the defendants from a judgment in favor of the plaintiffs, rendered in the Municipal Court of the city of New York, eleventh district, borough of Manhattan.

O'Brien, Boardman, Platt & Dunning (Randolph M. Newman, of counsel), for appellants.

Charles Pope Caldwell (J. Edward Murphy, of counsel), for respondents.

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DAVIS, J. This action is brought to recover on a bond given by the defendant the Fidelity and Deposit Company to the defendant Frank C. Merklee, a city marshal. The plaintiffs are judgment creditors of Joseph Newman. In their action against Newman they had obtained a warrant of attachment under which the defendant Merklee had taken possession of an automobile as the property of Newman. Third parties claimed the property seized and, upon the execution and delivery of the bond sued upon here, the marshal surrendered possession. The court rendered judgment against Newman; execution was issued and returned unsatisfied, the marshal having parted with the property seized under the attachment. This present action was therefore brought on the bond. The evidence shows that, although the seized property was claimed by a third party, the bond does not run to the plaintiffs, as provided in section 85 of the Municipal Court Act, but to the marshal alone; and it is conceded by the plaintiffs that this action cannot be maintained under that section. But plaintiffs contend that the action is authorized by sections 1421–1425 of the Code of Civil Procedure, those provisions being made applicable to municipal courts by section 304 of the Municipal Court Act. An examination of the terms and conditions of the bond in question will show that the plaintiffs have no right whatever to enforce it. It recites the issuance of the warrant of attachment against the property of Newman, and its delivery to Merklee as marshal. It does not recite any seizure, but it does recite that certain goods that appear to belong to the defendant Newman of the value of $550 have been claimed by some other party or parties. The defendant corporation then undertakes in the sum of $1,100 "to well and truly save, keep and bear harmless and indemnify the said Frank C. Merklee, as Marshal of the City of New York, his successor or successors, and any and all persons aiding or assisting him in the premises, from all harm, trouble, damages, costs, suits, actions, judgments and executions that shall or may from time to time arise, come or be brought against him, them or any of them, as well as for the renting and making sale in and by virtue of said execution of all or

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any goods and chattels, which he or they shall or may adjudge to belong to the said Joseph Newman, as well as in entering any shop, store, building or other premises, for the taking of such goods and chattels, then this obligation to be void; otherwise to remain, etc." It will be observed that this bond indemnifies the marshal for seizing, keeping or selling property which, in his judgment, belonged to the defendant Newman, and not for delivering it to a third party claimant. In form it is a bond such as would be given to the marshal by a plaintiff to protect the marshal in holding on to property seized at the instance of a plaintiff. It nowhere appears in this action that the marshal has suffered any damage by reason of the seizure of property deemed by him to be Newman's property. On the contrary, if he suffers at all, it will be because he surrendered seized property to a third party contrary to the instructions of his warrant and without securing himself by a proper bond. Sections 1421 to 1425 of the Code of Civil Procedure have no application to the facts of this case. Those sections refer to actions against public officers to recover a chattel levied upon by attachment or execution, or to recover damages resulting from levies or sales thereunder. This action comes within neither class. In view of these considerations we think the plaintiffs have no cause of action on the bond. If the marshal acted improperly in surrendering the property and was aided and abetted in that act by the other defendant to the damage of the plaintiffs, it may be that the defendants would be jointly and severally liable under the rule laid down in Dyett v. Hyman, 129 N. Y. 351.

The judgment is reversed and new trial granted, with costs to appellants to abide the event.

GILDERSLEEVE and HENDRICK, JJ., concur.

Judgment reversed and new trial granted, with costs to appellants to abide event.

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MEYER LIPSCHITZ, Respondent, *v.* SIMON HALPERIN et al., Appellants.

ABRAHAM LEVINE, Respondent, *v.* SIMON HALPERIN et al., Appellants.

(Supreme Court, Appellate Term, March, 1907.)

Execution against property — Sale — Property or title acquired by purchaser — Bona fide purchaser.

Fraudulent conveyance — Remedies of creditors and practice relating to attacks upon conveyances — Evidence — Weight and sufficiency of evidence.

Evidence — Opinion evidence — Non-expert evidence — Distinction between matters of fact and conclusions of law — Ownership.

The title of a purchaser of goods under an execution sale at public auction, he being the highest bidder and paying an adequate price, cannot be affected because the judgment was collusive between the parties to the action and given to hinder, cheat and defraud the creditors of the judgment debtor.

Where such property is again attached as the property of said judgment debtor and, upon said purchaser giving a bond under section 85 of the Municipal Court Act, is delivered to him by the marshal; and where, in an action brought upon the bond, it appears that, after the auction sale, the goods were placed in the possession of the judgment debtor with permission to sell them; that he was present when the attachment was levied; that his father-in-law's name was on the door of the room where the goods were when seized; that the name of the purchaser at the execution sale, who was the brother-in-law of the judgment debtor, was not on the door, and that said purchaser was not engaged in the business for which the goods levied upon were used, such facts have no bearing upon the *bona fides* of the purchaser at the execution sale and are not evidence of a subsequent transfer of the property from the purchaser to the judgment debtor.

It was incumbent upon the plaintiff, in the action upon the bond, to show that the purchaser had divested himself of his title by evidence of facts or circumstances from which it might fairly be inferred that such transfer was made.

The ownership of property is always a question of fact; and it was error to refuse to permit the purchaser at the execution sale to testify to whom the property belonged at the time of the subsequent levy.

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APPEALS by the defendants from judgments of the Municipal Court of the city of New York, fifth district, borough of Manhattan, in favor of the plaintiffs, entered upon the verdict of a jury.

Emanuel Klein, for appellants.

Joseph Wilkenfeld, for respondents.

HENDRICK, J. These actions were tried together, and the plaintiffs recovered judgments from which the defendants appeal. The following facts are undisputed. One Nathan Halperin, being indebted to the plaintiffs herein for goods sold and delivered to him, actions were commenced by them in the Municipal Court, warrants of attachment were issued and, on or about April 12, 1906, levies were made upon property claimed by the plaintiffs to be the property of Halperin. One Berman also claimed ownership of said property and, proceeding under the authority conferred by section 85 of the Municipal Court Act, gave bonds; and the property was delivered to him by the marshal. The condition of bonds given in such cases is that, "in an action upon the bond to be commenced within three months thereafter, the claimant will establish that he was the general owner of the property claimed at the time of the seizure or, if he fails so to do, that he will pay to the plaintiff the value thereof with interest." These actions were brought against the defendants, the obligors in the bond. Upon the trial the defendants proved that, upon March 12, 1906, in a judgment recovered by one Phillips against said Nathan Halperin, an execution was issued and a levy made thereunder upon the same property levied upon in the attachment suit and that, at a subsequent sale at public auction, duly advertised, at which numerous bidders were present, said Berman bid off the property for the sum of $300, which sum he paid to the marshal making the sale and took his receipt therefor. It was also shown that, prior to the sale, Berman had refused to loan Halperin money with which to pay the Phillips judgment and thus prevent the sale under execution. This sale took place on or about March 18, 1906, as appears by the

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record, being about three weeks prior to the levy made under the plaintiffs' attachments. If we should assume, of which there is not the slightest evidence, that the Phillips judgment was collusive between Phillips and Halperin and given with the intent to hinder, cheat and defraud creditors, the evidence is conclusive that Berman obtained title to the property in question by virtue of his purchase as aforesaid. A purchaser of goods under execution sale at public auction, he being the highest bidder and paying an adequate price, is in an entirely different position from that of a purchaser at private sale from an insolvent vendee knowing of his insolvent condition. Unless, therefore, it was shown that Berman had in some manner been divested of, and Halperin reinvested with, title to the property between the date of the execution sale and the time of its seizure under the attachments, the defendants should have had a judgment. As to this there was not the slightest direct evidence. The plaintiffs offered testimony to the effect that the goods were removed from Halperin's place of business to Prince street after the auction sale; that, at the time the levy under the attachments was made, Halperin was present; that the name of Weiser, the father-in-law of Halperin, was on the door of the room where the goods were when seized; that Berman's name was not on the door; that Berman and Halperin were brothers-in-law; that Halperin paid wages to certain employees; that Berman was engaged in the rag business, and not in the business of manufacturing purses which the goods levied upon were used for; that Halperin had these goods in his possession, and was engaged in selling them at the time of the levy; that Berman did not go into the leather business and that Halperin's two brothers were the obligors in the bond; and these circumstances are evidently urged as showing a fraudulent transfer from Berman to Halperin of the property in question, after the purchase by Berman at the execution sale. Such facts clearly have no bearing upon the *bona fides* of Berman's purchase at the auction sale, and we do not think that they are any evidence of a transfer of the property from Berman to Halperin after such sale. As we have seen, Berman is shown to have been a purchaser in good

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faith and for value at the auction sale. All of the acts shown to have been done regarding the property so purchased by him after such purchase are equally consistent with ownership in him as they are to a transfer of title by him. Berman had a perfect right to place the goods in Halperin's possession and to permit him to sell the same, and such acts are not evidence of a transfer of title to Halperin under the circumstances of this case. The plaintiffs do not stand in the position of *bona fide* purchasers of property from a fradulent vendee to whom a vendor has passed the title and possession of property, as, in such a case, if the vendor intended to part with the title and has delivered the possession of the property to a fraudulent vendee, thus enabling him to perpetrate a fraud upon an innocent third person, the original vendor must be the loser. Here the plaintiffs attempted to and did seize property by virtue of an attachment; and, when the claimant showed himself to be the owner, it was incumbent upon the plaintiffs to show that he had divested himself of his title, and such evidence must be facts or circumstances from which it can fairly be inferred that such transfer was made. Upon this pivotal issue the judgment is clearly against the weight of evidence. As there must be a new trial, it may be well to say that we do not regard the points made by the appellants, that the action was not begun within three months, or that his refusal of the right of last summing up to the jury was error, as of any weight. Reversible error, however, was committed in excluding the following testimony offered on the part of the defendants. Berman was asked "To whom did that property in Prince Street belong, on or about the 12th of April, 1906 (that being the time the marshal came to make the levy)?" The plaintiffs' counsel objected to this as calling for the conclusion of the witness and incompetent. The court said: "You mean the property that is in question?" Defendants' counsel: "Yes, the property in question, the property the marshal took that day up there on the writ of attachment." The court: "I shall sustain it as a conclusion. It is shown he purchased it, is it not, he purchased and paid $300 for it?" Defendants' counsel: "Not only this, I want to show

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he had other property there in addition to the property"—— The court: "That you might go into but that property you have shown he purchased and paid $300 for. Now, the legal conclusion would be that it naturally belonged to him, but it is not for him to say it. I shall sustain the objection to that." The ownership of property is always a question of fact, and the testimony called for was competent. Pichler v. Reese, 171 N. Y. 577; DeWolf v. Williams, 69 id. 621; Nicolay v. Unger, 80 id. 54; Sweet v. Tuttle, 14 id. 465; Davis v. Peck, 54 Barb. 425.

GILDERSLEEVE and DAVIS, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellants to abide event.

JOSEPH C. HOUGH, Respondent, *v.* CLARENCE D. BALDWIN, Appellant.

(Supreme Court, Appellate Term, March, 1907.)

Brokers — Compensation — Performance of duty by broker — Necessity of procuring binding legal contract.

Where a person produced by a real estate broker as a purchaser of certain premises declined to sign a contract therefor unless there should be inserted a provision that, in case he should reject title on account of certain encroachments, which would not otherwise have constituted a ground for such rejection, his deposit should be returned in full for all claims, the broker is not entitled to commissions, as the contract is thus rendered a mere option and he has not produced a party ready and willing to take the premises upon the terms proposed by the owner.

APPEAL by the defendant from a judgment of the City Court of the city of New York entered in favor of the plaintiff upon the verdict of a jury and also from an order denying defendant's motion for a new trial.

Bushby & Berkeley (James C. Bushby, of counsel), for appellant.

Steuer & Hoffman (Max D. Steuer and Henry A. Friedman, of counsel), for respondent.

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DAVIS, J. This case came before this court on a former appeal, and a judgment in favor of the plaintiff was reversed and a new trial ordered. Hough v. Baldwin, 50 Misc. Rep. 546. The new trial was had and the plaintiff again recovered and this is an appeal from that judgment and from an order denying a motion for a new trial. The testimony on the new trial did not differ materially from that given on the first trial. The action is for broker's commissions. The plaintiff claims to have earned his commissions for having produced a party ready and willing to exchange property with the defendant. It appears now that the party produced by the plaintiff would not sign the contract agreed upon the day before, unless there was inserted therein the provision, "it is understood between the parties hereto that if the party of the second part rejects title on the ground of bay window or stoop ledge encroachments then the deposit paid herein shall be returned in full for all claims." The contract was signed with this provision inserted. By this provision the exchange was made to depend upon the mere option of the plaintiff's customer to take or not in case of these encroachments. The contract was thus not a binding, enforceable contract, and the party produced by the plaintiff was not ready and willing to take upon the terms proposed to the plaintiff. These encroachments would not have been a good ground for rejecting the title if there was not a special agreement to that effect.

Judgment reversed and judgment directed for the defendant dismissing the complaint, with costs in the court below and the costs of this appeal.

GILDERSLEEVE and HENDRICK, JJ., concur.

Judgment reversed and judgment directed for defendant dismissing complaint, with costs in court below and of this appeal.

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ANDREW J. McINTOSH, Respondent, v. THE PULLMAN COMPANY, Appellant.

(Supreme Court, Appellate Term, March, 1907.)

Bill of particulars — When authorized — Damages — Special damages in action against carrier for loss of baggage.

Where, in an action against a carrier for the loss of a dress suit case, the plaintiff claims a certain sum for the cost of a bond required to obtain the reissue of certain shares of corporate stock, which were lost, and another sum for the loss of contracts covering a gold dredge in California, held, that plaintiff should furnish a bill of particulars, stating the amount of the premium claimed to have been paid on the bond and the items going to make up the sum claimed to have been the cost of procuring it; also, the nature of the contracts, with their dates, the nature of the damage claimed to have been suffered by their loss and the particular items of such damage.

APPEAL from an order entered in the office of the clerk of the City Court of the city of New York, denying defendant's motion for a bill of particulars.

Alexander & Green (Clifton P. Williamson, of counsel), for appellant.

Walter S. Newhouse, for respondent.

GILDERSLEEVE, J. The action is brought to recover $2,000 damages alleged to have been sustained by the plaintiff by reason of the alleged loss of a dress suit case and its contents from one of the defendant's cars. Annexed to the complaint and marked schedule "A" is a list of the articles claimed to have been contained in the suit case and of the items of damage claimed to have been suffered by the plaintiff by reason of their loss. Two of these items are the following:

"Cost of procuring bond of surety company which must be executed and delivered in order to have reissued to said Wallace 26,800 shares of the 'Squaw Creek Mining Company, Owner of the Dewey Mine,' which said stock was in

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the suit case referred to in the complaint and stolen with it, $400.00.

"Damages arising out of the loss of contracts entered into between said Wallace and one Charles H. Souther, of Boston, which said contract covered an interest in a certain gold dredge at Yreka, California, which said contract was in the suit case referred to in the complaint and stolen with it, $1,117.00."

Defendant's answer, among other things, puts it in issue as to whether the suit case was in fact lost, as to whether it contained the articles so enumerated and as to whether plaintiff sustained the damages claimed. The motion was for a bill of particulars "showing the name and place of business of the surety company by which it is claimed that the bond referred to in Schedule 'A' annexed to the complaint was issued; the amount of the premium claimed to have been paid thereon, and the particular items making up the sum of $400 claimed to have been the cost of procuring said bond; the par value of the 26,800 shares of stock of the 'Squaw Creek Mining Company, owner of the Dewey Mine,' claimed to have been contained in the suit case referred to in the complaint, and the market value thereof; the State in which the said Squaw Creek Mining Company was organized; the names of the officers of said mining company; the numbers of the said stock certificates; the name or names in which they were issued and in which said stock stood on the books of said company; the date when the said stock was reissued and the name or names of the persons to whom it was reissued; the particular nature of the contracts between Mr. Edgar T. Wallace and Charles H. Souther referred to in the complaint; the dates thereof and their number; the nature of the damage claimed to have been suffered by their loss; the name of the person to whom liability was incurred by reason thereof, and the particular items of damage claimed to have been suffered amounting to $1,117." The court may refuse or grant a bill of particulars in its discretion, and this ruling will not be set aside unless there is an abuse of the discretionary power. The office of a bill of particulars is to amplify a pleading and to inform the

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party with reasonable certainty of the nature of the claim made by his adversary in order to prevent surprise and to enable him to intelligently meet the issue upon the trial. Musser v. Aaron, 74 App. Div. 171, 172. In the case of Taylor v. Security Mut. Life Ins. Co., 73 App. Div. 323, the court says: "Of course a bill of particulars may not be required for the purpose of disclosing the evidence or names of witnesses of an adversary, but it will be required for the purpose of giving definite information as to a claim or proposition contended for by an adversary with respect to any material fact at issue, even though this may involve a disclosure of the names of individuals with whom it is claimed the transactions were had. (Ball v. Evening Post Pub. Co., 38 Hun, 11; Gee v. Chase Mfg. Co., 12 id. 630.)" In the case at bar the special damages alleged amount to $1,517, the total damages demanded being $2,000. By far the greater portion of plaintiff's claim, therefore, is based on these items of special damage of which particulars have been denied. It is apparent that defendant cannot, without some of these particulars, be prepared on the trial to meet such evidence as plaintiff may adduce regarding the alleged special damages. It seems to us that defendant should know the amount of the premium claimed to have been paid on the bond and the particular items making up the sum of $400 claimed to have been the cost of procuring said bond, also the particular nature of the contracts between Wallace and Souther referred to in the complaint, with the dates of such contracts, the nature of the damage claimed to have been suffered by their loss, and the particular items of damage claimed to have been suffered amounting to $1,117.

The order must be reversed, and the motion granted to the extent above indicated, without costs to either party, but with disbursements to the appellant.

DAVIS and HENDRICK, JJ., concur.

Order reversed and motion granted to extent indicated above, without costs to either party, but with disbursements to appellant.

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PETER SCHWARTZ, Respondent, v. THE INTERBOROUGH RAPID TRANSIT COMPANY, Appellant.

(Supreme Court, Appellate Term, March, 1907.)

Municipal Courts — Jurisdiction — Municipal Court of the city of New York — Action against carrier.

The Municipal Court of the city of New York has jurisdiction of an action against a carrier for the breach of its agreement to carry safely, though such breach be accompanied by acts of the carrier's servants amounting to an assault upon the plaintiff.

APPEAL by the defendant from a judgment in favor of the plaintiff, rendered in the Municipal Court of the city of New York, seventh district, borough of Manhattan.

Charles A. Gardiner (G. Carleton Goldthwaite, of counsel), for appellant.

Steiner & Petersen (Jerome Steiner, of counsel), for respondent.

DAVIS, J. Appeal from judgment rendered in the Municipal Court in favor of plaintiff for $278.75. The action was brought to recover damages for personal injuries. The defendant claims that the action was for damages resulting from an assault upon plaintiff by the defendant's servants. In such a case the Municipal Court has no jurisdiction and the judgment should be reversed. Interpreting this complaint in the light of the decision of the Court of Appeals in the case of Busch v. Interborough R. T. Co., 187 N. Y. 388; N. Y. L. J., March 8, 1907, it will appear clearly that the cause of action set forth is the violation of defendant's contract to carry safely. The complaint sets forth facts showing that the plaintiff became a lawful passenger, and then proceeds to state that the servants of the defendant, while acting as such servants, without cause or provocation and in breach and violation of the duties and obligations of the defendant toward the plaintiff, assaulted the plaintiff, etc

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The action was for a breach of contract and the judgment should be affirmed, with costs.

GILDERSLEEVE and HENDRICK, JJ., concur.

Judgment affirmed, with costs.

FRANK GLAZIER and MORRIS ALBERT, Respondents, *v.* THE OLD DOMINION STEAMSHIP COMPANY, Appellant.

(Supreme Court, Appellate Term, March, 1907.)

Carriers — Carriage of goods — Actions against carriers — Sufficiency of evidence — Evidence by carrier of delivery to connecting line.

In an action against a carrier, for failure to deliver goods shipped to a point not on its line, under a contract providing that the carrier might deliver the goods to another carrier on the route to the destination, the uncontradicted testimony of one who was at the time in the employ of another carrier, to whom defendant delivered the goods in pursuance of its contract, of the fact of such delivery, from his memory, refreshed by a memorandum made at the time in the usual course of business, may not be disregarded by the jury; and a judgment based upon a verdict for plaintiffs will be reversed.

APPEAL by the defendant from a judgment of the City Court of the city of New York, entered in favor of the plaintiffs on the verdict of a jury and also from an order denying defendant's motion for a new trial.

Owen & Sturges (Frank D. Sturges, of counsel), for appellant.

Manheim & Manheim (Jacob Manheim, of counsel), for respondents.

DAVIS, J. This action was brought to recover the value of a case of clothing shipped by the plaintiffs at New York by defendant's line and consigned to J. L. Lapidus, Denver,

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Colo. The jury rendered a verdict in plaintiffs' favor; and, from the judgment for $413.90 entered thereon, the defendant has appealed. The receipt of the property is admitted by the defendant. From the bill of lading it appears that one case of clothing, consigned to J. L. Lapidus, Denver, Colo., was received by the defendant July 18, 1903, to be forwarded on the steamship *Jamestown* sailing July 18, 1903. The bill of lading also provided that the defendant might deliver the merchandise to another carrier on the route to the destination, if the destination were not on defendant's own line. The defendant claims to have taken the merchandise to Newport News, Va., and there to have delivered it to the Chesapeake and Ohio Railroad for transportation to Denver. There is practically no dispute in the testimony. It appeared in evidence that Denver was not on the defendant's line; that Newport News was one of the southern terminals of the defendant for goods destined for Denver, Colo., and that the Chesapeake and Ohio Railroad, at the time in question, received goods at Newport News for transportation west. If, then, this merchandise was delivered to the Chesapeake and Ohio Railroad by the defendant for shipment to Denver, it was absolved from liability for the loss and the judgment should have been for the defendant. Article 5, Indorsed on Bill of Lading. See also Root v. Great Western R. Co., 45 N. Y. 524; Farnsworth v. N. Y. C. & H. R. R. R. Co., 88 App. Div. 320, cited in Isham v. Erie R. R. Co., 112 App. Div. 612, 615. To sustain the claim of delivery to the Chesapeake and Ohio Railroad at Newport News, the defendant introduced the testimony of Mr. Trice, taken under a commission. He testified that, in July, 1903, he was loading clerk for the Chesapeake and Ohio Railroad Company, at their pier No. 6, Newport News, and had occupied that position for about six years. He stated that he had to do with the case of goods in question and had loaded it in Baltimore and Ohio car No. 91440, July 20, 1903. This witness testified from recollection refreshed by a memorandum made by him at the time in the usual course of his business as loading clerk. This memorandum was a check mark

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made by him opposite the name of J. L. Lapidus on his loading sheet a copy of which is in evidence. The witness testified, in effect, that he made the mark as the case was placed on the car No. 91440. This testimony was uncontradicted and the witness was in no wise impeached. Nor was any objection taken to any part of his testimony. By reference to the loading bill used by him to refresh his recollection, it clearly appears effective to aid him in that respect. There appear several entries upon this loading bill that might naturally call to the witness' mind the facts testified to by him. The name of J. L. Lapidus as consignee, the letters "Cs. Clo." as the merchandise consigned, the marks "Jas. 169" as the carrier from whom the railroad received the merchandise, the point of shipment, the destination, the number of the car and the date of loading doubtless made the refreshing of his recollection comparatively easy. Under the circumstances the learned court might have taken the case from the jury and rendered judgment for the defendant. The jury, obviously, wholly disregarded the testimony as to the delivery to another carrier at Newport News and rendered a verdict contrary to the evidence.

The judgment appealed from should be reversed and a new trial ordered, with costs to appellant to abide the event.

Gildersleeve and Hendrick, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

Mary McArthur, Respondent, *v.* The New York City Railway Company, Appellant.

(Supreme Court, Appellate Term, March, 1907.)

Carriers — Carriage of passengers — Liability for personal injuries to passengers — Actions by passengers for personal injuries — Admissibility of evidence — Report of accident.

In an action against a street railway company for damages for personal injuries received in alighting from a car, where it appears that certain employees of defendant were witnesses of the accident

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but defendant has not called them, it is error to exclude the testimony of defendant's accident clerk which it offers upon the question whether he had received any report of the accident.

Appeal by the defendant from a judgment for $121.50, entered in plaintiff's favor in the Municipal Court of the city of New York, twelfth district, borough of Manhattan, upon October 3, 1906, after trial therein before the justice and a jury.

William E. Weaver, for appellant.

Robert H. Hibbard, for respondent.

Gildersleeve, J. The action is brought to recover for personal injuries alleged to have been sustained by plaintiff on Sunday afternoon, July 22, 1906, while a passenger upon one of the defendant's north-bound Amsterdam avenue cars. Plaintiff resided near the corner of One Hundred and First street. She says that she wished to alight at One Hundred and First street and, when the car approached One Hundred and First street, she motioned for the conductor to stop the car; but the car did not stop there, but continued on to One Hundredth street, and she motioned for the bell again, and she says the conductor pulled the bell. She also says that the car came to a stop; that, when she had one foot on the running-board and one foot on the ground, the car started and threw her on her face. It was brought out on cross-examination that, on September 6, 1906, the plaintiff, in her own home, had written out in her own handwriting a statement as to the happening of the accident in which she stated that "the car was not quite at a full stop when I attempted to alight." She gives some explanation with regard to this statement which it is not necessary to discuss, as the appellant urges on this appeal only the exceptions to the exclusion of evidence, and on the subject of this statement proper instructions were given to the jury, to which no exception was taken. At the close of the plaintiff's case the defendant offered to show, by the accident clerk of this Sixth Avenue division, that the defendant had no report of

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this accident. Plaintiff objected to the accident clerk testifying as to whether he had any report of the accident, the objections were sustained, and defendant duly excepted. We think that the exclusion of this testimony was error. The defendant is entitled to offer such testimony upon the ground that it is some evidence that no such accident happened; and the defendant is also entitled to explain in this manner its reason for failing to call apparent witnesses of the accident, in the persons of its employees in charge of the car, since much prejudice could well arise against such a defendant, if it were not permitted to explain its failure to call employees in charge of a car. 88 N. Y. Supp. 1014; 96 id. 333; Id. 857.

It may not, therefore, be said that the defendant has not been prejudiced by the exclusion of this testimony; more particularly, as urged by defendant's counsel, that the written statement of the plaintiff that she stepped from a moving car would well have afforded the jury a basis for rendering a verdict for the defendant, if the defendant could have been permitted to explain to the jury why it failed to corroborate this witness' written statement by other testimony.

The judgment should be reversed and a new trial ordered, with costs to appellant to abide the event.

DAVIS and HENDRICK, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

THE FEDERAL SIGN SYSTEM ELECTRIC, Respondent, v. GEORGE BLOYEN, Appellant.

(Supreme Court, Appellate Term, March, 1907.)

Municipal Courts — Procedure — Transfer to another court or district.

In an action in the Municipal Court of the city of New York the trial judge has no authority to interrupt the trial, which is being had in the proper district, and take the case to another district for the completion of the trial; and by so doing he loses jurisdiction of the case.

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APPEAL by the defendant from a judgment of the Municipal Court of the city of New York, tenth district, borough of Manhattan, rendered in favor of the plaintiff.

Alexander La Mont, for appellant.

David Paine, for respondent.

GILDERSLEEVE, J. This action was brought in the tenth district which, concededly, was the proper place for its trial under subdivision 1, section 25, of the Municipal Court Act. It came on for trial on October 31, 1906, at about twelve-twenty p. m. of that day; and, while the defendant was cross-examining a witness, the court charged the defendant's counsel with prolonging the case by asking the same questions repeatedly, a course clearly within the power of the court to control, and the trial judge said: "I am going to set this case aside and take up another case." This was objected to by defendant's counsel, but the court took up other cases and proceeded with the trial of those until three-fifty p. m. The plaintiff then asked the court not to proceed further with the case on that day, owing to the absence of a witness. The judge thereupon announced that he proposed to take the case to the seventh district, there to finish the trial. The defendant thereupon objected to such removal of the trial of the case, and announced his readiness to proceed, and asked for a dismissal of the case owing to the plaintiff's inability to proceed, and excepted to the refusal of the court to rule upon his motion. The hearing was thereupon adjourned until November first, to the seventh district court. Upon the resumption of the hearing in the seventh district, the defendant again objected to the trial proceeding in the seventh district, and asked that it be sent back to the tenth district, which was refused, and the defendant excepted. The only authority given the Municipal Court for the transfer of the trial of an action from one district to another, except upon consent of the parties, is where the district in which the action is brought is not the proper district. Munic. Ct. Act, § 25, subd. 4. By the transfer of

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this action the court lost jurisdiction to render any judgment against the defendant, and the judgment must be reversed.

DAVIS and HENDRICK, JJ., concur.

Judgment reversed and complaint dismissed, with costs.

ABRAHAM GRAFF and BENNIE FRANKEL, Appellants, v. JACOB BLUMBERG, Respondent.

(Supreme Court, Appellate Term, March, 1907.)

Master and servant — The relation — Actions for wrongful discharge — Presumptions and burden of proof — Seeking other employment.

In an action to recover damages for the breach of a contract of employment, the plaintiff is not required to show affirmatively, as part of his case, that he sought other employment but could not find it; that he found other employment elsewhere, or refused similar employment when offered, or that he might have found such employment, is matter of defense.

APPEAL by the plaintiffs from a judgment in favor of the defendant rendered in the Municipal Court of the city of New York, twelfth district, borough of Manhattan.

Joseph M. Herzberg, for appellants.

Herman S. Fried, for respondent.

GILDERSLEEVE, J. The complaint alleges that plaintiffs are copartners in business; that, on or about September 17, 1906, plaintiffs and defendant made an agreement whereby the plaintiffs undertook to render their services to defendant for the alteration, repairing and pressing of all garments which defendant should send them for such purposes, from September 17, 1906, to January 1, 1907, in consideration whereof defendant agreed to pay them for their services at

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the rate of twelve dollars each week, and to pay in addition thereto for all findings supplied by said plaintiffs on such garments; that plaintiffs entered on the performance of said agreement and duly discharged all the duties thereof, until October 29, 1906, and have ever since been and still are ready and willing to perform all the conditions of said agreement on their part; that defendant then (on October twenty-ninth) refused and still refuses to allow them so to do or to pay them therefor, to their damage in the sum of $121.92, for which sum, together with costs, plaintiffs demand judgment. In their bill of particulars plaintiffs itemize their damage as follows:

"Oct. 29, 1906, to Jan. 1, 1907, 9 weeks at $12 per week	$108.00
Sept. 17 to Oct. 29, 6 weeks unpaid, $2.....	12.00
Findings supplied by plaintiffs on garments.	1.92
"Total	$121.92"

The answer is practically a general denial, except that it admits that "some understanding" was entered into between the parties; and it counterclaims $27 by reason of an alleged failure of plaintiffs to do the work given to them by defendant. One of the plaintiffs took the stand and testified: "I worked some time before for the Lennox Co. (defendant) on a small salary, and he (Kahn, defendant's manager) calls up on that day (Sept. 17, 1906) and made an agreement for $12 a week up to Jan. 1st for alterations, pressing and sewing, and to hold off $2 each week up to Jan. 1st, on account that we should not break the contract. The defendant said (as to the findings to be supplied on the garments) that we are supposed to be paid." A memorandum written on defendant's letter paper was introduced in evidence, which is conceded to be signed by defendant's manager, which memorandum reads as follows: "Sept. 17, 1906. We hereby agree to pay Mess. Graff & Frankel the sum of thirty (30) dollars, two (2) dollars extra each week, from this date until Jan. 1, 1907, if said Graff & Frankel continue to do all

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our work, (alterations, pressing, &c.) satisfactorily during said time. sd. Lenox Clothing Co., Isidore Kahn, Mgr." Plaintiffs further showed that they worked about four weeks after September seventeenth, were paid ten dollars a week, but were supposed to get twelve dollars, defendant taking off two dollars, and that defendant refused to give more work, although plaintiffs were ready and willing to do the work. At the end of plaintiffs' testimony, the court dismissed the complaint for failure of proof, without prejudice to the bringing of another action. As the complaint was dismissed on plaintiffs' evidence alone, that evidence is entitled not only to belief, but to all favorable inferences that can reasonably be drawn therefrom. While the testimony cannot be regarded as entirely satisfactory, we think plaintiffs made out a *prima facie* case. The counsel for the appellants states that the reason given by the justice for dismissing the complaint was that the plaintiffs had not affirmatively shown that they had tried to find other employment and had been unable to find any. If this were the reason for the dismissal, the learned justice fell into error. The plaintiffs were not bound to show affirmatively, as part of their direct case, that such employment was sought and could not be found. It was for the defendant, as part of the defense, to show either that the plaintiffs had found employment elsewhere, or that other and similar employment had been offered and declined, or that such employment might have been found. In an action to recover damages for the breach of a contract, the plaintiff is, *prima facie,* damaged to the extent of the amount stipulated to be paid. Howard v. Daly, 61 N. Y. 362, 371; Milage v. Woodward, 186 id. 252. The court in the case of Milage v. Woodward, *supra,* further stated: "Upon breach by an employer of a contract of employment, by discharge of the employee before the expiration of his term of service, the latter is only bound to use reasonable diligence to procure other employment of the same kind in order to relieve the employer as much as possible from loss consequent upon the breach; he is not bound to look for or accept occupation of another kind. (Fuchs v. Koerner, 107 N. Y. 529.) *It is clear that the defendant did not sustain*

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the burden of proof resting upon him to show that the plaintiff found or could have found employment elsewhere."

We think in the interests of justice a new trial should be granted.

DAVIS and HENDRICK, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellants to abide event.

FRED SCHNAUFER, Respondent, *v.* HENRY AHR, Appellant.

(Supreme Court, Appellate Term, March, 1907.)

Mechanics' liens — Consent of owner — Persons who are owners.
Frauds, Statute of — Promise to answer for debt, etc. of another — New consideration — Promise not within statute.
Verdict and findings — Verdict and special findings by jury — Amendment — By court — Interest, when not added.

Where the owner of land contracted to sell it and the purchaser proceeded to erect a building upon it but failed and did not carry out his contract and, thereafter, one who had furnished labor and materials for the building and who might file a lien therefor refrained from so doing at the request of the owner and upon the owner's promise to pay him, his action in refraining from filing a lien was a good consideration for the promise of the owner to pay his claim, which was an original promise and not a promise to pay the debt of another within the meaning of the Statute of Frauds.

In such a case the consent of the vendor is sufficient to authorize one furnishing labor and materials to file a lien against the property when the purchaser has failed to carry out his contract.

Where the jury finds a verdict for a certain amount and interest, without specifying the amount of the interest nor the date from which it is to be computed, and it was not clearly shown from what date interest should be computed, the court has not power to correct the verdict by adding a certain amount for interest.

APPEAL from a judgment for $1,667.85 in favor of plaintiff against defendant, on a verdict, after trial in the City Court of the city of New York.

The clerk of the Trial Term did not include interest in his minutes of the trial and verdict; and, on motion of plaintiff, the court amended the verdict by adding interest, with

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an opinion. Defendant appeals from the order so amending the verdict and also from the order denying motion to set aside the verdict and for a new trial on the minutes.

Stuart G. Gibboney (John Brooks Leavitt, of counsel), for appellant.

John Oscar Ball (A. P. Bachman, of counsel), for respondent.

GILDERSLEEVE, J. In December, 1899, one Nikisch, who had begun work on certain premises, northwest corner of Brook avenue and One Hundred and Sixty-ninth street, Bronx, failed, and abandoned said premises. Plaintiff had furnished certain sand, stone and team hire on the premises for which he claimed Nikisch owed him $1,432.09. Plaintiff alleges that they were furnished with the knowledge and acquiescence of defendant, which is denied by defendant. Certain contractors filed mechanic's liens, and plaintiff states that he was preparing to do the same when defendant, it is alleged, requested him not to do so, and agreed that, if the lien were withheld, he, defendant, would pay the Nikisch claim, on the further condition that plaintiff would furnish the sand necessary to complete the buildings. To this, plaintiff says, he assented; whereas defendant says that it was a gratuity on his part, as he only wanted to offer plaintiff an opportunity to make up for his loss on the Nikisch contract. The amount of the Nikisch claim was $1,432.09, and the price of sand $2.50 a load. The amount for the sand furnished defendant to complete was $700 and the price of sand $2.50 per load, the same as the Nikisch contract. Defendant was the owner of the lot on the northwest corner of Brook avenue and One Hundred and Sixty-ninth street, Bronx, with the length running along One Hundred and Sixty-ninth street. The houses were built facing One Hundred and Sixty-ninth street and the foundations were necessarily for the most part on the lot owned by the defendant. The lot behind, upon which the houses would rest in the rear, was owned by one Schmitt, but afterward purchased by defendant. Nikisch never owned any of the land. He seems to have had

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a contract of sale with defendant and paid him $100 down, and then proceeded to build. All the foundation stone and sand were furnished by plaintiff. Plaintiff says defendant supplied the anchors of iron which went into the foundation walls. Defendant denies that he did so. Plaintiff and his witnesses say that the amount of stone was ascertained by the foreman of the masons, Foliana, in the presence of said Foliana, plaintiff's superintendent, Martin, and the contractor Nikisch, and that the figures so made were assented to and the original memorandum of the amounts was used by plaintiff in making up his bill for stone. The sand account was made from tickets. Plaintiff, as we have seen, says that he had taken measures to imitate the others who had claims against Nikisch, by filing a mechanic's lien and stated to defendant the amount of plaintiff's claim, and that, at defendant's request and on his promise to pay the claim when he had completed the buildings and sold them, if plaintiff would forbear filing his lien and agree to furnish the rest of the sand for the buildings, plaintiff forbore filing the lien and, in due course, furnished the sand to defendant. The latter was paid for in a note and cash; but the main claim of $1,432.09 was refused, although defendant sold the houses in 1904, as claimed by plaintiff, who says he saw "the transfer in the paper." The said transfer is not denied by defendant. There is no dispute as to ownership in the fronting property on One Hundred and Sixty-ninth street, in defendant, or that he afterward bought the Schmitt rear lot, and completed the buildings partly with plaintiff's sand and on the foundations built with plaintiff's stone and sand. Foliana, the mason, and Miller, the plaster man, put liens on the property, and were paid by defendant. The Schmitt property was taken over by defendant subject to the Miller lien. The issues were submitted to the jury in a charge to which no exception was taken, and the jury gave a verdict for the full amount claimed by plaintiff. At the close of plaintiff's case and again at the close of the whole case, the defendant moved to dismiss the complaint on the following grounds: (1) That the promise, if made, was to pay the debt of another and is void under the Statute of Frauds as

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not being in writing; (2) no promise has been proven to pay any specific sum in consideration of no lien being filed; (3) that, if any promise was made, it was to pay the amount of Nikisch's indebtedness, and there is no proof as to what the amount of the indebtedness was. The motion was denied and exception duly taken. The court, in substance, charged the jury that, as any promise, if made, was not in writing, there was no obligation upon defendant unless he made a direct promise on a consideration moving to himself; that in this case such consideration was claimed to be plaintiff's right to file a lien on defendant's premises; and, consequently, if defendant had promised to pay plaintiff for the materials delivered to Nikisch if plaintiff did not file a lien, the jury must be satisfied that the plaintiff had a right to file a lien upon the defendant's premises in order that there should be a consideration for defendant's alleged promise. Neither side took any exception to the charge, as we have already stated. The jury returned a verdict for the plaintiff, according to stenographer's minutes, for "$1,432.09, with interest," but the verdict as recorded was for $1,432.09, without any mention of interest. About two weeks after the trial and before the entry of judgment, upon special motion, the court granted an order, "that the verdict rendered as $1,432.09 in favor of plaintiff be and the same is hereby amended so as to have added thereto interest from the 1st day of January, 1905." Thereafter, and on October thirty-first, and not in the presence of the defendant, there was a calculation of interest to the amount of $150.56, and thereupon judgment was entered against the defendant for damages "$1,582.65, besides costs." On October nineteenth the defendant's motion for a new trial upon the minutes, upon all the grounds stated in section 999 of the Code, was denied by order entered that day. We think that there was some proof upon which the jury could find that, in December, 1899, Nikisch owed to plaintiff $1,432.09 and that plaintiff could have filed a lien against the property, and that, in consideration of plaintiff's not filing such lien, defendant promised to assume the payment of the Nikisch debt upon certain conditions which have been fulfilled. As defendant was the owner

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of the premises, or a part thereof, he derived a direct benefit to himself from the abstention of plaintiff from filing a lien, which consideration took the promise out of the Statute of Frauds. "Where the primary debt subsists and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor and beneficial to him, and such that the promisor thereby comes under an independent duty of payment irrespective of the liability of the principal debtor." White v. Rintoul, 108 N. Y. 222. There can be but little doubt that the defendant knew all about the work going on at the premises. The jury must have so thought. Defendant still owned the lot upon which all the buildings faced and, hence, upon which the foundations, made up of plaintiff's materials, lay for the most part. He confesses that title had never parted from him and he was $100 ahead by the Nikisch deposit. Nikisch failed December 15, 1899. Plaintiff made his last delivery about a week or so before. Under the Mechanic's Lien Law he had ninety days to file his notice of lien, running the limit into March, 1900. Defendant admits that there was a meeting in March. Plaintiff and his superintendent say it was soon after the failure that meeting was had. At any rate, there seems little doubt that a meeting was had in the ninety-day period. The jury had the issue plainly set before it and decided for plaintiff on that. Defendant, as we have seen, owned the land upon which the foundations principally lay. It never passed from his hands. He afterward acquired the rear lot, subject to the lien of a Nikisch lien by Clifford L. Miller. He even had his deed to the One Hundred and Sixty-ninth street plot made more certain by a new deed from the original grantors. It is alleged that defendant knew of the contract of plaintiff, and furnished the anchor irons. The jury evidently believed the allegation to have been proved, even in the face of defendant's denial. The following is an extract from the Lien Law (Laws of 1897, chap. 418, § 3, Mechanic's lien on real property): "A contractor, sub-contractor, labor or material man, who performs labor or furnishes material for the improvement of real property with the *consent* or at the request of the

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owner thereof, or his agent, contractor, or sub-contractor, shall have a lien for the principal and interest of the value or agreed price of such labor or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed in this article." The consent clause in the Lien Law proceeds upon an equitable principle that one who knowingly received the benefit of the labor or property of another in the form of improvement upon his land, ought to have his property subjected to a lien for the value of such improvement. Butler v. Flynn, 51 App. Div. 225. "Where the vendor, under an executory contract for the sale of real estate, consents that the vendee take immediate possession of, and erect a permanent structure on, the premises, lienors who have rendered work, labor and services to such structure may, after the vendee's default, enforce their liens against the premises to the extent of the market value of the labor and material done and furnished." Beck v. Catholic University, 32 Misc. Rep. 567. "A person who has contracted to sell real estate remains the 'owner' within the meaning of the statute, until the title passes." Packard v. Sugarman, 31 Misc. Rep. 623. It follows then that defendant, being the owner under an executory contract to sell, which was never fulfilled, came under the law as liable to those doing work or furnishing materials with his knowledge or consent. The jury having decided the fact of consent, the right to lien as against defendant existed in the plaintiff, and to forbear filing such was a valuable consideration. The witnesses, having given contradictory testimony and the court having distinctly charged as to the question of preponderance and credibility, without an exception, the verdict should not be disturbed, as there is sufficient evidence to sustain the verdict. There is, however, another objection presented by defendant on this appeal which we think well taken. The court, as we have seen, granted an order amending the verdict, as recorded, by adding interest in the sum of $150.56. It has been held that, even though the jury is discharged, the court has the power to correct the verdict so as to make it conform to the real determination of the jury, if the motion is made at

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the term of the court at which the verdict was rendered. 119 N. Y. 166. That doctrine, however, does not apply here; for it is not evident that the real determination of the jury was to add $150.56 interest to the amount allowed to the plaintiff. Even assuming that they intended to allow some interest on the claim, the date from which interest would have been allowed and, consequently, the amount of such interest, are not clearly shown. As asked by defendant's counsel, was the interest to date from the beginning of the action, or from the date when Nikisch's indebtedness accrued, or from the date of defendant's promise to pay the Nikisch debt upon the completion and sale of the building, or from the date of such sale itself?

We think the judgment should be modified by deducting therefrom the $150.56 allowed by the court below as interest; and, as so modified, the judgment and order denying the motion for a new trial should be affirmed, without costs to either party.

DAVIS and HENDRICK, JJ., concur.

Judgment modified and, as modified, affirmed, without costs to either party.

THE NILES-BEMENT-POND COMPANY, Appellant, *v.* GUSTAV URY, Respondent.

(Supreme Court, Appellate Term, March, 1907.)

Frauds, Statute of — Promise to answer for debt, etc. of another — New consideration — Forbearance.

Where one, who states that he has succeeded to another's business, writes to one of the latter's creditors that additional capital necessary to develop the business will be forthcoming and asks the creditor's indulgence until matters are straightened out, which he hopes will be soon, when the creditor's account will be taken up, and, relying upon the letter, the creditor forbears to sue the original debtor, such request for indulgence and promise, followed by the creditor's forbearance for a reasonable time, will render the promisor liable for the payment of the creditor's claim though no definite period of forbearance was specified.

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APPEAL by the plaintiff from a judgment of the Municipal Court of the city of New York, first district, borough of Manhattan, rendered in favor of the defendant, on a submission of the controversy upon agreed facts as provided by section 241 of the Municipal Court Act.

Mullan, Cobb & Mitchel, for appellant.

Edgar Hirschberg, for respondent.

Per Curiam. The stipulated facts show a sale of machinery by the plaintiff-appellant to one Alfred A. Ury, doing business under the name and style of Manhattan Gas Appliance Company, which machinery was never paid for. Said Alfred A. Ury, after such indebtedness was incurred, transferred to the respondent the said business, property and good will, including the goods sold by the plaintiff. Respondent then continued to conduct the business in the same place. After such transfer, plaintiff wrote a letter addressed to "Manhattan Gas Appliance Company," demanding payment, and received in reply the following letter:

"GUSTAV URY Telephone, 2014 Spring.
"Successor to
"MANHATTAN GAS APPLIANCE COMPANY,
"Manufacturers of
"Gas Lighting Appliances,
"241-243 Centre Street,
"NEW YORK, *Jan.* 24, 1906.

"Niles-Bement-Pond Co.,
"111 Broadway,

"GENTLEMEN.— In reply to your letter of the 22nd inst., beg to say that I have succeeded to the business of the above firm.

"The additional capital necessary to develop the business will be forthcoming, but as matters are in a very mixed condition, *it is necessary for me to ask your indulgence, until such a time when matters will be straightened out, (which I hope will be soon) at which time the matter of your account*

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will be taken up with you. My reputation in the business world is of the best and I will furnish you any information you may desire.

"Appreciating any courtesy extended to me, I am,

"Very truly,

"GUSTAV URY."

Plaintiff, relying on said letter alone, "forebore and has continued to forbear to sue Alfred A. Ury for the amount due." The sole question is whether, under the facts as stated above, said letter of respondent rendered him liable to plaintiff for the amount of the bill. The plaintiff's position is that the defendant promised to pay plaintiff a certain sum that was due plaintiff from a third person, to wit, defendant's predecessor in the business, known as Manhattan Gas Appliance Company. The consideration was the forbearance by the plaintiff to proceed against said third person. As was said in the case of Strong v. Sheffield, 144 N. Y. 392, 394: "There is no doubt that an agreement by the creditor to forbear the collection of a debt presently due is a good consideration for an absolute or conditional promise of a third person to pay the debt, or for any obligation he may assume in respect thereto. Nor is it essential that the creditor should bind himself at the time to forbear collection or to give time. If he is requested by his debtor to extend the time, and a third person undertakes in consideration of forbearance being given to become liable as surety or otherwise, and the creditor does in fact forbear in reliance upon the undertaking, although he enters into no enforcible agreement to do so, his acquiescence in the request, and an actual forbearance in consequence thereof for *a reasonable time,* furnishes a good consideration for the collateral undertaking. In other words, a request followed by performance is sufficient, and mutual promises at the time are not essential, unless it was the understanding that the promisor was not to be bound, except on condition that the other party entered into an immediate and reciprocal obligation to do the thing requested. * * * The only qualification to be made is that in the absence of a specified time a *reasonable* time is held

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to be intended." The duration of the forbearance in the case at bar did not depend upon the pleasure of the plaintiff, but did depend upon that of the defendant. To take advantage of defendant's letter of January 24, 1906, it was incumbent upon plaintiff to wait a reasonable time for defendant to get his affairs "straightened out," to use his own phrase. Plaintiff did wait a reasonable time, to wit, over six months. It is true that in the case at bar the request for forbearance did not come from the original debtor; but we do not think it of vital importance who makes the request, whether debtor or third party, when the creditor furnishes the consideration by his act of forbearance, and the promisor profits thereby. In the case at bar, appellant did acquiesce and forbear for a period of more than half a year, believing that respondent had actually bound himself to assume the indebtedness in the stead of his predecessor in the business, Alfred A. Ury. The defendant has, provided his letter evinces an intent to pay if indulgence be given, brought himself within the rule of Strong v. Sheffield, *supra*. We are inclined to the opinion that the respondent's letter to appellant, viewed in the light of the circumstances that accompanied its making, is a request for forbearance and was intended as an assumption of his predecessor's indebtedness upon acquiescence in its terms and forbearance being given. Forbearance is asked for in express terms. The agreed facts show that respondent was successor to the entire business of the debtor, including its good will and the machinery sold by plaintiff to Alfred A. Ury, the purchase price of which is the subject of this action. He replies to plaintiff's letter concerning a matter which, according to defendant's theory, should have been replied to by his predecessor, Alfred A. Ury. He asks plaintiff's indulgence, evidently for himself and not for his brother. He says that the matter of plaintiff's "account will be taken up" with it, the inference being that *he*, defendant, will take it up, since he is writing for himself and not for Alfred A. Ury, the original debtor. He refers to his own reputation in the business world. What has his reputation to do with it, if he did not consider he was assuming the debt? He ends "appreciating any cour-

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tesy you will extend to *me*," not to his brother Alfred. If he were not bound to pay, how would an extension to Alfred A. Ury be of value to the defendant? Language must be interpreted in the sense in which the promisor knew or had reason to know that the promisee understood it. Gillet v. Bank of America, 160 N. Y. 549, 555; Tracy v. First Nat. Bank, 48 App. Div. 285, 288; Maloney v. Iroquois Brewing Co., 173 N. Y. 303, 310. If the view can be taken that the language of the letter in question is in any wise ambiguous, any doubt should be resolved in plaintiff's favor. As pointed out by appellant, in cases nearly related to that at bar, namely, cases of guaranty, the question has often arisen as to whether a person meant to bind himself in a certain way; and, where a person acting in good faith has been misled to his injury, the guarantor has been held to account. Gates v. McKee, 13 N. Y. 235. In the case at bar appellant put full trust in respondent, forebore proceeding against another, and is now met by attempted evasion of liability. The *objects* which the parties had in view should be taken into consideration, as well as the *condition* of the parties. Solomon Tobacco Co. v. Cohen, 95 App. Div. 297. It cannot be successfully maintained that there was an absence of any personal interest on his part in requesting appellant to forbear. The defendant had the said machinery and, further, having succeeded to an apparently going business, would naturally be anxious to make it a success; and he must have been desirous of avoiding the entry of judgments against the business, which would tend to injure his credit, as a judgment against his predecessor, Alfred A. Ury, doing business as Manhattan Gas Appliance Company, would presumably have that tendency.

We think the judgment should be reversed.

Present: GILDERSLEEVE, DAVIS and HENDRICK, JJ.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

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JOHN BOGART, Appellant, v. LIPPMAN TANNENBAUM, Respondent.

(Supreme Court, Appellate Term, March, 1907.)

Attorney and client — The relation with the client — Compensation — Action — Presumptions and burden of proof.

In an action by an attorney to recover for services rendered, where the defendant sets up a separate agreement that the attorney would render the services without any charge therefor, it is error for the court to refuse to charge that the burden of proof as to the separate agreement is on the defendant.

APPEAL by the plaintiff from a judgment of the City Court of the city of New York, entered in favor of the defendant upon the verdict of a jury, and also from an order denying a motion for a new trial.

Bogart & Bogart (Benjamin N. Cardozo, of counsel), for appellant.

Thomas J. Bannon (Franklin Bien and Josiah Canter, of counsel), for respondent.

HENDRICK, J. The complaint in this case alleges the rendition of services as an attorney of the value of $500; that the defendant agreed to pay that sum therefor and that the same has not yet been paid. The answer is, first, a general denial; and, secondly, for a separate and distinct defense, the defendant alleges in substance that the plaintiff agreed that, if the defendant would withdraw an appeal which he had taken from a judgment in favor of one Dattelbaum, who was the plaintiff's father-in-law, the plaintiff would render any and all services in an action to be brought against one Joseph Rundback and one Edward Rundback to recover the amount of said judgment, and would assist in any suit that had been brought, or was about to be brought, without any charge whatsoever, and that, relying upon the said agreement, and having entered into the same with the plaintiff, the defendant caused said appeal to be withdrawn, and that the services mentioned in the complaint were the services per-

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formed under that agreement. The employment of the plaintiff and the value of his services were admitted upon the trial. Evidence was adduced by the defendant to establish the separate defense set up in the answer; and, at the conclusion of the case, the following requests and exceptions were noted in the record: "Defendant's counsel: I ask your Honor to charge that the burden of proof is upon the plaintiff. The Court: I so charge. Exception. Defendant's counsel: I ask your Honor to charge that if the testimony is so evenly balanced that they cannot tell who has the greater weight of the evidence, then the defendant is entitled to a verdict. The Court: I so charge. Plaintiff's counsel: I except. I ask your Honor to charge the jury that the burden of proof as to the separate agreement is on the defendant. The Court: I decline to so charge. Plaintiff's counsel: I except." I do not think these rulings can be sustained. The plaintiff's case was made out when he proved his retainer, the rendition of his services, and their value. It was then incumbent upon the defendant to establish his separate defense, namely, that the services were to be gratuitous in the event of the defendant's complying with the plaintiff's request to withdraw the appeal from the judgment against plaintiff's father-in-law. It was error to refuse to charge, as requested by the plaintiff's counsel, that the burden of proof as to the special agreement was on the defendant. Merzbach v. Mayor, 163 N. Y. 16; Smith v. Long Island R. Co., 102 id. 190. As was said in Merzbach v. Mayor, *supra*, "The jury were instructed in substance that the burden was on the plaintiff to establish an agreement that he should be paid, whereas they should have been instructed that the burden was upon the defendant to establish an agreement that he was not to be paid."

For the reasons above stated, the judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

GILDERSLEEVE and DAVIS, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

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THE DUNBAR BOX AND LUMBER COMPANY, Respondent, v. JULIA D. MARTIN, as Executrix of the Last Will and Testament of JOHN L. MARTIN, Deceased, Appellant.

(Supreme Court, Appellate Term, March, 1907.)

Negotiable instruments — Actions — Evidence — Admissibility — Ambiguity and extrinsic evidence.

In an action, brought by the payee, upon a promissory note signed with the name of a corporation followed by the signature of its president, where the note contains the words "we promise to pay" and the president's signature is written in the space contained in a rubber stamp bearing the corporate name which was designed for the signature of the officer subscribing the name of the corporation, the note is ambiguous; and it is error to exclude evidence tending to show that the note was a corporate note, and not the joint note of the corporation and its president, nor the individual note of the president; and a judgment in such case founded upon a verdict directed against the executrix of the president, in an action brought against her upon the note, will be reversed and a new trial granted.

APPEAL from a judgment and order of the City Court of the city of New York, entered upon a verdict directed by the court, in favor of the plaintiff.

A. Leo Everett, for appellant.

Henry Hogeboom, for respondent.

DAVIS, J. This is an appeal from a judgment of the City Court entered upon a verdict directed by the court and from an order denying defendant's motion to set the verdict aside and for a new trial. The action was brought by plaintiff as payee of a promissory note. The note reads as follows:

"$1,750. NEW YORK, *April* 27, 1906.

"On July 2nd after date we promise to pay to the order of Dunbar Box & Lumber Company seventeen hundred and fifty 00/100 Dollars at Phenix National Bank, 49 Wall Street. Value Received.

"VARICK CONTRACTING COMPANY.

"No. Due July 2, 1906. JOHN L. MARTIN."

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The defendant is sued as executrix of John L. Martin. Verdict was directed for the plaintiff, on the theory that the note was unambiguous and, on its face, the individual note of John L. Martin. The defendant claimed that the note was either the note of the Varick Contracting Company, alone, or, if not that, the joint (but not joint and several) obligation of John L. Martin and the Varick Contracting Company, and that, in either case, the court erred in directing a verdict for the plaintiff. The defendant further claims that the note is ambiguous on its face; that, although Martin's name is signed to the note, the stamp of the Varick Contracting Company is also there and Martin's name is inserted in the space evidently intended to hold an officer's signature. The note also reads: "We promise to pay" etc., and this would indicate that it was not the promise of a single individual. Moreover, it appears from the testimony of Mr. Reid, the president of the plaintiff, that he received the note from Martin and saw him sign it and that his company had no account with Martin personally but only with the Varick Contracting Company of which Martin was president. Under these conditions we think the note was ambiguous, and that it does not appear absolutely to be the personal note of defendant's testator. It follows, therefore, that evidence showing that the note was the company's note and accepted as such by the plaintiff would be proper. Such evidence was offered by the defendant and excluded under objection. For instance, after proving the signature of Mr. Reid, who was president of the plaintiff at the time, defendant offered in evidence the following memorandum signed by Mr. Reid:

"June 29. Mr. Reid wants check for $750 — x int. of which R. will notify us — and note for 1,000.00 at 3 mos. of V. C. C. to John L. Martin and endorsed by him to Dunbar Box & Lumber Co. Date note June 29 — Mr. R. promises to retire and return V. C.

"June 4. /06. Co. Note for 1750 — of July 2."

"THOS. T. REID."

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This paper was excluded as tending to change the meaning of the note sued upon. As stated above, the note in suit is ambiguous. It was, therefore, error to exclude this memorandum. It shows quite clearly that the president of the plaintiff regarded the note as that of the Varick Contracting Company, alone, and that he was looking forward to retiring the note on June 29, 1906, upon a payment of $750 on account and taking a new note of the company upon which Martin would be personally liable as endorser. The giving of the new note on June twenty-ninth was prevented by Martin's death on June 13, 1906. It may be suggested that Reid had no power to bind the plaintiff by the declarations and admissions in this memorandum. A sufficient answer to that objection is that he was its president and, presumably, in charge of these very matters for his company.

Under these circumstances, we think the judgment and order appealed from should be reversed and a new trial granted, with costs to appellant to abide the event.

GILDERSLEEVE and HENDRICK, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

ADOLPH ABRAHAMS, Appellant, *v.* SAMUEL FINKELSTEIN and ISRAEL H. MAAGET, Respondents.

(Supreme Court, Appellate Term, March, 1907.)

Master and servant — The relation — Actions for wrongful discharge — Pleading.

In an action to recover damages for the breach of a contract of employment, an allegation in the complaint that defendants broke said agreement "by attempting to terminate said agreement and discharge said L. and refusing to allow said L. to longer continue to perform his services under the said agreement, and instructed said L. to return the samples of goods of defendants which he was using to solicit orders, and in other respects prevented the said L. from soliciting orders from his customers throughout the State of

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New York" is a sufficient allegation of the breach of the contract by defendants; and it was error to dismiss the complaint for failure to state facts sufficient to constitute a cause of action, on account of the supposed insufficiency of such allegation.

APPEAL by the plaintiff from a judgment of the City Court of the city of New York dismissing the complaint.

Hays & Hershfield (Daniel P. Hays and Ralph Wolf, of counsel), for appellant.

Henry Salant, for respondents.

GILDERSLEEVE, J. Upon a former trial of this action, the court expressed the opinion that the complaint was defective in that it alleged only an "attempt" to discharge plaintiff's assignor from defendants' employ, but not an actual discharge; and he intimated his purpose to dismiss the complaint. Plaintiff then made a motion to amend the complaint by inserting an allegation that defendants wrongfully discharged plaintiff's assignor; and an order was entered permitting plaintiff, without costs or terms, to so amend his complaint "by suggestion on the record, without requiring the plaintiff to serve any amended complaint herein, and with the same force and effect as if the said words had been originally included and contained at the end of paragraph sixth of said complaint." To the complaint, as thus amended "by suggestion," the defendants were given two days to answer. The defendants appealed from this order, which was reversed as unauthorized and erroneous, and the "motion remitted to the City Court for rehearing." 49 Misc. Rep. 448. No further steps were taken to amend the complaint; but the motion was withdrawn and the case came on for trial on the original pleadings, when the court dismissed the complaint on the ground that it did not state a cause of action. The paragraph of the complaint in question reads as follows, viz.: "Upon information and belief, that, on or about February 2nd, 1904, the defendants, without any right or authority, broke and violated said agreement by *attempting* to terminate said agreement and discharge said Lobe, and re-

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fusing to allow said Lobe to longer continue to perform his services under the said agreement, and instructed said Lobe to return the samples of goods of defendants which he was using to solicit orders, and in other respects prevented the said Lobe from soliciting orders from his customers throughout the State of New York." The action was brought by plaintiff, as the assignee of one Lobe, to recover damages for the alleged breach of a written agreement of employment, which is annexed to the complaint and forms part thereof. This agreement is admitted by the answer. In this agreement the defendants undertook to employ said Lobe for a term of twelve months, beginning October 15, 1903, and therein agreed to pay said Lobe seven per cent. commission on all sales made by him, and further agreed that said Lobe should have a drawing account of $150 per month. The question presented on this appeal is whether the complaint sufficiently alleges the breach of the agreement by the defendants. The rule is that a pleading should be liberally construed; and, on a motion to dismiss a complaint for insufficiency, it is not sufficient reason for a dismissal that the facts are imperfectly or informally averred, or that the pleading lacks definiteness and precision; and the complaint is deemed to allege what can be implied from the allegations therein by fair and reasonable intendment. Marie v. Garrison, 83 N. Y. 14; Sanders v. Soutter, 126 id. 195; Coatsworth v. Lehigh Valley R. Co., 156 id. 451. Regarding the complaint in the light of this principle, it seems to us that it was error to hold that it did not state facts sufficient to constitute a cause of action.

The judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

DAVIS and HENDRICK, JJ., concur.

Judgment reversed and new trial granted, with costs to appellant to abide event.

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CHARLES A. ALEXANDER, Appellant, *v.* HARRY E. HARKIN and HENRY T. HICKS, Respondents.

(Supreme Court, Appellate Term, March, 1907.)

Pleading — Amendments — Amendments by leave of court — Time for amendments — After verdict — To conform to proof.

In an action of replevin, where the proof showed a joint ownership of the property in question in the plaintiff and defendants and judgment was rendered in conformity with such facts, upon appeal by plaintiff, the answer, which alleged individual ownership in the defendants, will be amended to conform to the proof, and the judgment will be affirmed.

APPEAL by the plaintiff from a judgment in favor of the defendants rendered in the Municipal Court of the city of New York, tenth district, borough of Manhattan.

Reid, Esselstyn & Ketcham (J. Ard Haughwout, of counsel), for appellant.

John C. Shaw, for respondents.

HENDRICK, J. Alleging that he was the owner of certain chattels, the plaintiff brought this action in replevin against the defendants, based upon a demand and refusal to deliver the property to the plaintiff. The defendants in their answer denied the plaintiff's ownership of the chattels and set up title in themselves. The issue tried in the court below was whether the plaintiff, who concededly at one time owned a portion of the property and who furnished the defendants with the funds with which they purchased the remaining portion, turned this property and money into a partnership or joint venture, in company with the defendants, in trying to establish the business of buying, repairing and selling second hand automobiles, the net profits of which were to be divided equally between the parties herein; or whether the plaintiff retained title to the property in himself and merely loaned it to the defendants, to enable them to put in salable condition two automobiles, which the

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plaintiff claimed he had placed with the defendants for the purpose of being repaired and then to be sold and the profits divided. The evidence taken on the trial is very voluminous and it is unnecessary to go into it in detail. A careful examination leads us to the conclusion that there was sufficient testimony from which the court below was justified in finding that the parties to this action embarked in a joint business enterprise, either as partners or joint owners; the plaintiff contributing his share in money which was used in purchasing the property claimed by him, and also contributing the property owned by him and delivered to the defendants, the subject of this action, and the defendants furnishing the premises used in the business, paying the rent therefor and the wages of employees and contributing their own labor, the net profits of the enterprise to be divided equally, each having one-third thereof; and that the plaintiff failed to establish absolute ownership of the chattels replevied in himself and, therefore, was not entitled to recover. herein. The judgment in the court below awarded possession of the disputed property to the defendants and, in case a return thereof could not be had, then the sum of $300 judgment, its proven value. This judgment is supported by the facts but does not conform to the defendants' answer. The defendants, although alleging ownership in themselves of the property in question, gave no proof of such ownership, their evidence showing no individual ownership but a joint ownership by all the parties therein. This court has the power to amend a pleading upon appeal where no substantial right of a party is affected. Van Orden v. Morris, 19 Misc. Rep. 497; Rein v. Brooklyn Heights R. Co., 47 Misc. Rep. 675. And, where an amendment could have been allowed in the court below, the appellate court will treat it as amended on appeal if the facts found support the judgment. Douai v. Lutjens, 21 App. Div. 254. The answer herein will, therefore, be considered as having been amended by inserting an averment therein that the plaintiff and the defendants are joint owners of the property in question; and, as thus amended, the judgment will be affirmed. This amendment will avoid all question as to the conclusiveness of the judg-

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ment upon the question of ownership of the disputed property which might arise should such amendment not be made and should either of the parties resort to a court of equity to determine the rights of the respective parties in the common fund.

GILDERSLEEVE and DAVIS, JJ., concur.

Judgment affirmed, with costs.

JAMES M. COUPER, JR., Respondent, *v.* PAUL F. O'NEILL, Appellant.

(Supreme Court, Appellate Term, March, 1907.)

Brokers — Compensation — Agreements as to compensation — Payment when title is passed.

Where, by express contract, the commissions of a real estate broker are not payable until title to the premises passes, and, because of defects found in the title, the contract of purchase is canceled and the deposit returned to the prospective purchaser, the real estate broker has no right to commissions.

APPEAL by the defendant from a judgment in favor of the plaintiff rendered in the Municipal Court of the city of New York, tenth district, borough of Manhattan.

James E. Kelly, for appellant.

William Harman Black, for respondent.

HENDRICK, J. Plaintiff brought this action and recovered a judgment for $250 for broker's commissions alleged to have been earned by him in procuring a purchaser for defendant's property. It does not appear from the testimony what arrangement, if any, there was between the parties preceding the day on which a contract for the sale of defendant's real estate was entered into between him and the prospective purchaser, thus distinguishing this case from the case of Hough v. Baldwin, 50 Misc. Rep. 546–548. But, on the day and

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at the time the written contract was signed by the defendant and said purchaser, who is conceded to have been able to make the purchase upon the terms named in the contract, the plaintiff and defendant executed the following instruments in writing:

"*March 12th,* 1906.

"I hereby agree that my commission on sale of No. 34 Horatio Street for Paul F. O'Neill, shall be Two Hundred and fifty dollars as full commission; and that it shall not be *due and payable* until the title to said premises shall be passed. I agree that no other broker has an interest in this sale.

"J. M. COUPER, Jr.,
"336 West 58th St."

"*March 12th,* 1906.

"I recognize James M. Couper, Jr. as a broker who negotiated the sale of my property, No. 34 Horatio Street, and agree to pay him a commission of Two hundred and fifty dollars ($250.00) Dollars, when the title is passed.

"PAUL F. O'NEILL."

Title to the property never passed, as defects were found therein, and the contract was subsequently canceled and the defendant returned the deposit paid by the prospective purchaser to him. The plaintiff claims that his right to commissions was earned at the time the contract was executed between the defendant and the vendee and that, as the failure to convey was wholly the fault of the defendant, he is entitled to maintain this judgment. Ordinarily that would be true; but, in the case at bar, the plaintiff has expressly agreed that his commissions shall not be "due and payable until title shall be passed." This agreement was made at the time an enforceable contract between the vendor and the vendee had been entered into and, presumably, was for the purpose of evidencing in writing the agreement made between the plaintiff and the defendant regarding the payment of commissions. That this is true is shown by the testimony of the defendant, received without objection or exception,

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who testifies that: "Q. Now Mr. O'Neill, please tell the court just what took place when these two papers, Exhibits 1 and 2, introduced by the plaintiff, were signed? A. Well, do you want me to tell what took place between Mr. Couper and myself? Q. Yes. A. Well, before we came to an agreement on the price, when I thought there might be an agreement, I said, 'Mr. Couper, I don't know you very well,' as I had never met the gentleman before; I said, 'So as you won't have any misunderstanding when we come to an agreement, I don't intend to pay only $250 as commission for the sale of this house; also I don't intend to pay any commission until title has passed.' He said, 'That will be agreeable to me,' and before I signed the contract in your office I told you the same matter in front of Mr. Couper, and Mr. Couper said that was right." Cross-examination by plaintiff's counsel: "Q. Mr. O'Neill, at the time you drew this agreement you intended to pay Mr. Couper $250; did you not? A. I did if title passed. A. Well, you expected that it was going to pass; did you not? A. I did, but I did not know anything to stop it. Q. Well, you intended then to pay Mr. Couper this $250? A. Yes, sir; if the title passed." Under these facts we think the plaintiff had no cause of action against the defendant. The cases cited by the respondent are those where no specific agreement was made between the vendor and the broker and it was held that the broker had earned his commissions when he had brought a purchaser, able, willing and ready to purchase in conformity with the terms of sale. It is reasonable to assume that, if the plaintiff regarded his commissions as having been due or earned at the time the contract between the vendor and vendee was executed, he would have entered into no agreement that the same should not be due or payable until the title passed, thus making his commissions dependent upon the occurring of that event.

GILDERSLEEVE and DAVIS, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

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SAMUEL GRUBER and PHILIP GRUBER, Appellants, v. THE NEW YORK CITY RAILWAY COMPANY, Respondent.

(Supreme Court, Appellate Term, March, 1907.)

Evidence: Judicial notice — Matters relating to municipalities — Direction and location of streets; Weight and sufficiency — Uncontradicted testimony.

The Municipal Court of the city of New York may take judicial notice of the direction and location of the streets and avenues in the city of New York.

Where the only testimony in support of plaintiff's case is that of the plaintiff himself, and he makes contradictory statements and his testimony contains evidence of inherent improbability and two years elapsed, after the cause of action is claimed to have accrued, before the action was brought, these facts taken together are sufficient to justify the trial court in refusing to credit the plaintiff's testimony, though uncontradicted, and a judgment rendered in favor of the defendant will be affirmed.

APPEALS by the the plaintiffs from two judgments of the Municipal Court of the city of New York, ninth district, borough of Manhattan, rendered in favor of the defendant.

James L. Quackenbush, for respondent.

Louis Karasik, for appellants.

GILDERSLEEVE, J. The plaintiffs brought these actions to recover for penalties for defendant's refusal to give transfers to the plaintiffs while passengers upon the defendant's car. Both cases were tried upon the same day and upon substantially the same testimony, the plaintiffs being brothers and traveling in company at the time the transfers were alleged to have been refused. Each plaintiff testified in his own case and was the only witness sworn in his own behalf. At the close of the testimony in each case, the defendant moved to dismiss the complaint, which was denied; and the defendant offered no testimony but rested, and thereafter the

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court rendered judgments for the defendant. The plaintiffs claim that these cases come well within the decisions of this court in the Lewis, Kappas and Madden cases, reported in 50 Misc. Rep. 534, 535 and 555, respectively; and plaintiffs ask for a reversal on that ground. We differ with this contention and think that the cases above mentioned are clearly distinguishable from the cases at bar. There is no rule of law more plain or oftener invoked than that which declares that the credibility of a witness is to be determined by those whose duty it is to weigh it, whether it be a court or a jury; and this right is not to be taken away from the trial court, nor curtailed in the slightest degree by an appellate tribunal. In a case where the right to recover rests wholly upon the unsupported testimony of a party whose interest in the result is patent, it is sometimes extremely difficult to determine where the truth lies. In such a case the trial court has the benefit of an observance of the demeanor of a witness and his manner of giving testimony, which is not available to an appellate court; and such observation is often a valuable aid in arriving at the truth of the testimony given. In connection with the observance of the witness and his appearance upon the stand, the court must also take into account the probability of the occurrence narrated by him, and whether it is consistent with the known course of nature, or with the operation of the common principles by which the conduct of mankind is usually governed, and also the consistency, character, independence and situation of the witness and the collateral circumstances which tend to contradict or confirm his statements. Where, as in the Lewis case and the others cited above, the testimony is uncontradicted and falls within the rules there laid down, the court cannot arbitrarily disregard the testimony, even though it be given by a party and is uncorroborated. A different situation, however, appears in the cases at bar. The plaintiffs testified that they boarded a north-bound Madison avenue car at One Hundred and Sixth street. They made somewhat contradictory statements as to their destination, at first testifying that they were going to a drug store on Eighth avenue and subsequently testifying that they had relatives at 109

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West One Hundred and Fourteenth street between Lenox and St. Nicholas avenues whom they were going to visit. They claimed to have ridden to One Hundred and Sixteenth street, waited there for a west-bound car, and that, boarding that, they rode to Eighth avenue, intending to go to One Hundred and Fourteenth street as aforesaid. The court can take judicial notice of the direction and location of the streets and avenues in this city (Skelly v. New York El. R. Co., 7 Misc. Rep. 88; affd., 148 N. Y. 747), and it can readily be seen that, by leaving the Madison avenue car at One Hundred and Fourteenth street, the plaintiffs could have reached the home of their relatives by a walk of but little, if any, over two blocks; while, if their statement is true, they rode northerly ten blocks, then westerly four blocks, reaching a point from which they must then have walked nearly four blocks in order to reach their destination. In other words, they traveled a distance of eighteen blocks when they could have reached their destination by going ten blocks only. This statement alone contains evidence of inherent improbability. It is also to be noted that over two years elapsed between the date of the alleged refusal to give transfer and the bringing of the action, and this fact may also be taken into consideration as a factor in arriving at a proper conclusion. Muller v. Vessell, 101 N. Y. Supp. 1064. While, possibly, none of these facts, standing alone, would be of sufficient importance to warrant the conclusion that the plaintiffs' testimony was not credible, nevertheless, the court below had a right to consider them all; and, taken together, they might well have led the court to disbelieve the plaintiffs' testimony; and we must hold that, under all the facts and circumstances disclosed by the record, the court was amply justified in giving the judgments rendered by him.

DAVIS and HENDRICK, JJ., concur.

Judgments affirmed, with costs.

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MORRIS WEINTRAUB, Appellant, v. JONAS WEIL and BERNHARD MAYER, Respondents.

(Supreme Court, Appellate Term, March, 1907.)

Vendor and purchaser — Enforcement generally — Action by purchaser for recovery back of purchase price — Burden of proof and presumptions.

The burden is upon the vendee, under a contract for the sale of real estate, to show that his rejection of the title was for a good and valid reason.

Where a vendee, under a contract for the sale of certain real estate, occupied by a tenant and sub-tenant, seeks to recover a deposit made as part of the purchase price, upon the ground that he had rejected the title because the lease had not been terminated as prescribed therein, and it appears that the tenant had agreed to annul the lease and had surrendered the premises, it will be presumed, in the absence of proof to the contrary, that the surrender of the original lease was executed in conformity with the terms of the lease and that the sub-tenant's rights had been extinguished.

APPEAL by the plaintiff from a judgment entered in the office of the clerk of the City Court of the city of New York in favor of the defendants, upon the verdict of a jury rendered by direction of the court, and from an order denying plaintiff's motion for a new trial.

Manheim & Manheim (Jacob Manheim and Harry A. Gordon, of counsel), for appellant.

Arnstein & Levy (Samuel Levy, of counsel), for respondents.

GILDERSLEEVE, J. The plaintiff appeals from a judgment of the City Court in favor of the defendants, entered upon the verdict of a jury, rendered by direction of the court, and from an order denying the plaintiff's motion for a new trial. The action was brought to recover the sum of $700, deposited by the plaintiff as part of the purchase price, under a con-

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tract for the sale of real estate, together with the sum of $175, the reasonable expense incurred in the examination of the title. The closing of the title failed for the reason that, in the opinion of the plaintiff, the defendants did not tender a title in accordance with the terms of the contract. The case was tried upon an agreed statement of facts. The appellant challenges the judgment upon three grounds, upon the theory that in the direction of the verdict the court below erroneously overruled each of the three grounds of his contention. It appears that the defendants, on January 30, 1902, made a lease of the entire premises to one Sarah Vladofsky, for a term of five years from the first day of February, 1902. This lease contained the following provision: "It is further agreed by and between the parties hereto that, in case the said party of the first part (the defendants) desire to concel this lease and regain possession of the house hereby demised, they shall have the right and are hereby empowered so to do, upon returning to the said party of the second part (Sarah Vladofsky) the sum deposited as security ($400) and paying in addition the sum of $100, and the said party of the second part (Sarah Vladofsky) upon receiving ten days' notice and receiving such sum hereby agrees to cancel this lease and surrender said premises." It further appears that, on May 6, 1903, this lease was assigned to Gussie Vladofsky, and that, on April 12, 1905, the said Gussie Vladofsky agreed to an annulment of the lease and surrendered the premises to take effect as of April 4, 1905. It further appears that, by a written lease bearing date February 1, 1905, Gussie Vladofsky rented the basement of the premises in question for a term of two years and three months, beginning February 1, 1905, and ending May 1, 1907, to Moses Deitz. It further appears that said Deitz entered into possession of the said basement, and that subsequently, by regular assignments, one Dora Bernstein became a sub-tenant of the basement, and was in possession thereof at the time appointed for the performance of the afore-mentioned contract and at the time of the trial. The principal point urged by the appellant as ground for reversal is that the lease of the entire premises between the defend-

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ants and Sarah Vladofsky was not terminated in the manner prescribed in the lease, and that, therefore, the rights of Dora Bernstein as a subtenant were not affected by the alleged surrender, and that she was entitled to possession of the basement until February 1, 1907. It is the contention of the appellant that, if this ground of objection is not sustained, he is entitled to have considered other grounds, set forth in his brief, which he claims entitle Dora Bernstein to the possession of the basement, notwithstanding the alleged surrender by Vladofsky. We think the record fully supports the claim of the respondents that there was but one question litigated on the trial, namely, the encumbrance upon the title by reason of the lease under which Bernstein claimed possession. Without reviewing the various stipulations by counsel, as they appear upon the record, the following, which is the latest direct reference to the point to be litigated, seems to be conclusive. It is as follows: "Defendants' counsel: Let me understand before we go any further. Do you or do you not stipulate in this case that the only point to be litigated is this encumbrance that was created by the lease from the assignee of Mrs. Vladofsky to Moses Deitz and his respective assignees? Do you stipulate that, or don't you? It must be either 'yes' or 'no.' The Court: That is already on the record; I therefore direct a verdict in favor of the defendants." The appellant as ground for reversal invokes the application of the rule laid down in Eton v. Luyster, 60 N. Y. 252. In that case, as here, the defendant claimed the right of possession by reason of a surrender of the term by the original lessee, without the knowledge or assent of a subtenant, and not in conformity to the terms of said lease. The lease contained a clause providing for the termination thereafter, at the option of the landlord, after two months' notice. It was held that the lease could not be terminated and the subtenant's rights abrogated, except in the manner and upon the terms prescribed in the lease. We are unable to apply this principle in aid of the appellant, for the reason that it nowhere appears in the record, by proof or by admission, that the surrender of the original lease was not executed in conformity with the terms thereof.

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For all that appears, the ten days' notice provided for was duly given. No wrongdoing on the part of the landlords has been alleged or proven. In the absence of such allegation and proof, it must be presumed that the lease was terminated in strict accordance with the terms. The burden was upon the plaintiff to show that his reason for the rejection of the title was a good and valid reason, and that the surrender was not executed in accordance with the terms of the limitation expressed in the lease. Greenblatt v. Hermann, 144 N. Y. 13.

For these reasons we are of opinion that the judgment and order should be affirmed, with costs to the respondent.

DAVIS and HENDRICK, JJ., concur.

Judgment affirmed, with costs to respondent.

SOL EHRLICH, Plaintiff, *v.* ANNIE PIKE, Defendant.

(Supreme Court, New York Special Term, March, 1907.)

Arbitration and award: Proceedings on the hearing — Reception of evidence; Award — Effect — Conclusiveness in general.
Sunday — Judicial proceedings on Sunday — Awards.

An award of arbitrators acting within their jurisdiction, untainted by corruption, fraud or like misconduct, operates as a final conclusive judgment and must be submitted to, however unsatisfactory and disappointing it may be to the parties to the arbitration agreement.

Where, upon an arbitration to settle partnership accounts, one of the three arbitrators is an accountant chosen for the express purpose of examining the books involved in the controversy and to save the other arbitrators that trouble and he, accordingly, prepares a statement which the arbitrators use in making their award, a claim that such arbitrator thus became an expert witness and that his testimony was irregularly received in the absence of the defeated party is untenable, where opportunity to inspect the books was extended to the other arbitrators and to the parties.

An award is not invalid because it was discussed and practically agreed upon on Sunday, where it was not made, published nor delivered until the following day.

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MOTION to set aside and vacate the award made by arbitrators.

Steuer & Hoffman, for plaintiff.

Lippmann & Ruck (Wm. N. Cohen, of counsel), for defendant.

LEVENTRITT, J. In February, 1896, Sol Ehrlich, the plaintiff, and Annie Pike, the defendant, agreed to form a copartnership under the name of A. Pike & Co., and entered into articles by which the plaintiff was to receive one-third and the defendant two-thirds of the profits of their future transactions. In February, 1902, though retaining her interest in that firm, the defendant embarked in another business with one Apfelbaum under the style of Pike & Apfelbaum and there, also, she secured two-thirds of the profits, leaving to Apfelbaum the remaining one-third. She then made a separate agreement with the plaintiff by which he became entitled to one-third of her two-thirds share of the profits of Pike & Apfelbaum. That concern continued until January, 1904, when Apfelbaum retired and the defendant became the sole owner, the plaintiff acquiring a right to one-third of the profits. A year later the copartnership existing between the plaintiff and the defendant was dissolved and then disputes and differences arose in relation to an accounting. The plaintiff claimed that the defendant had agreed, in consideration of plaintiff's promise to continue to indorse notes for her accommodation, that his participation in the profits, which had accrued in the two concerns during the three years next preceding the dissolution, should be increased to one-half; and he complained that, though he had accordingly indorsed notes at her request, she refused to recognize his right to the increase. On the other hand, the defendant maintained that the original understanding had never been modified and that the plaintiff's right to participate was limited to one-third. After ineffectual efforts to adjust or compromise their differences, the plaintiff sued for an accounting on the basis of the percentage

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of profits claimed by him. Negotiations then undertaken resulted in a submission of the controversy to arbitration. The plaintiff and the defendant respectively nominated Bernhard Vorhaus and Albert Frankl, merchants, as arbitrators, and they appointed Adolph Holde, a certified public accountant, to act as the third arbitrator. Hearings were subsequently had, testimony pro and con taken and an award made by Vorhaus and Holde in favor of the plaintiff in the sum of $7,653.02, thus sustaining his claim to an increased share of the profits. Frankl declined to join in the award. The defendant then made this motion to set aside and vacate the award, alleging that Vorhaus and Holde were chargeable with gross misconduct, partiality and unfairness in the arbitration proceedings. The specifications thereof are substantially these: 1. That at the first session testimony was taken in the absence of the defendant and of her husband, who represented her. 2. That at the second hearing, while the defendant's husband was testifying, Vorhaus exhibited bias and prejudice by frequent interruptions, untimely cross-examination and insulting reflections. 3. That the testimony given at one of the hearings was not reduced to writing despite the protest of the defendant. 4. That the amount of the award was based on a statement made by Holde as a result of his examination of the books of the plaintiff without affording Frankl an opportunity to verify the figures of the computation. 5. That by the submission of that statement Holde became a witness as an expert and his testimony was irregularly received in the absence of the defendant. 6. That the arbitrators wrongfully declared the arbitration closed and refused to allow the defendant to introduce additional proof.

A very considerable part of the voluminous affidavits submitted is devoted to the rehearsal of facts bearing upon the main issue, the determination of which was confided to the arbitrators. Irrespective of the provision in the arbitration agreement that neither party "shall have the right to appeal therefrom to any court or tribunal," the finding of the arbitrators on the merits of the controversy is not subject to review. Even if it could be said that the award resulted

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from error of judgment as to the law or as to the facts, it is proof against an application to set it aside. The arbitrators did not exceed their jurisdiction and if corruption, fraud or like misconduct did not taint their award, it operates as a final, conclusive judgment; and, however unsatisfactory and disappointing to the defendant, she must submit to it. Matter of Wilkins, 169 N. Y. 494; Hoffman v. De Graaf, 109 id. 638; Masury v. Whiton, 111 id. 679; Morris River Coal Co. v. Salt Co., 58 id. 667. I have, therefore, sifted the averments of the affidavits, discarded those bearing upon the issue, which the award has judicially settled, and retained only those bearing upon the charges of misconduct, partiality and unfairness against the arbitrators Vorhaus and Holde, which are made the basis of this application. This process exposes the weakness of the defendant's accusations.

The first charge scarcely merits consideration. While it is literally true that the hearing proceeded in the absence of the defendant or her husband, it is established, apart from other evidence, by the testimony of Frankl, the arbitrator selected by the defendant, that her husband was duly notified of the time and place of holding that session and that he declared his intention not to attend, on the ground that he did not desire to meet the plaintiff, whose testimony was to be taken on that occasion. Neither the defendant nor her husband attempts to controvert those facts, but they rest on the bare statement of their absence.

The second ground of complaint depends largely upon inference or conclusion. Not a single instance of interruption or cross-examination is specified and the only reflection upon the defendant's husband, by Vorhaus, occurred according to the testimony of Frankl after the hearings had been closed and at the final meeting of the arbitrators devoted exclusively to the consideration of the evidence adduced and the award to be made. The remark then made was in the course of the argument upon the merits of the controversy.

For two reasons the objection that a part of the testimony was not reduced to writing is groundless. The submission did not require the reduction of the testimony to writing;

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and the making of the alleged protest is not established. As against the sole and unsupported statement made by the defendant's husband in this language: "I protested against this not being done," there is presented to the contrary not only the sworn statements of Frankl, Vorhaus, Holde and others, who were admittedly present on the day of the alleged protest, that the arbitrators agreed to conduct the session without a stenographer, and that this arrangement was acquiesced in if not assented to by the defendant's husband.

Irrespective of the fact that a consideration of the fourth and fifth charges involves a review of the proceedings and of the method of computation adopted, those charges are refuted by the facts and circumstances disclosed. The arbitrator Holde is a public accountant. He was selected, according to Frankl's own statement, for the express purpose of examining the books involved in the controversy and "to save" the other arbitrators "that trouble." It was, if not the express, the tacit understanding of the arbitrators and the parties that the examination of the books should be confided to Holde and that the result of such examination should be controlling. Furthermore, the opportunity to inspect was not restricted to Holde but was extended to his associates and to the parties, as the books were produced at the hearings and were not only accessible to inspection but were consulted in connection with testimony elicited. The only objection raised by Frankl relates to the refusal to give him possession of Holde's memoranda of figures and computation. While there was a refusal to permit a removal of the memoranda there was an invitation extended and ample opportunity afforded to examine them before the award was agreed upon. This invitation was not only declined but its rejection was emphasized by Frankl's statement that in no event would he agree to an award in favor of the plaintiff.

The remaining objection is equally without support.

The arbitrators are unanimous in the statement that at the last session, held on October 28, 1906, both the plaintiff and the defendant's husband were asked if they intended to offer further evidence; that each replied in the negative and that thereupon the testimony was declared closed. Frankl,

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recognizing that situation, attended at the meeting on November 4, 1906, to consider the evidence and to decide upon an award. The questions at issue were discussed at length by each of the arbitrators and it was only when Frankl learned that Vorhaus and Holde were opposed to his views and intended to find for Ehrlich that he insisted upon a reopening of the hearings to enable the defendant to submit additional proof, and it was only after defendant's husband had been notified by Frankl of the intention to find for the plaintiff that he became active in his efforts to have the arbitration opened. This objection was, therefore, an afterthought resorted to by the defendant only when apprised of defeat.

This rather extended discussion may have magnified the gravity of the charges which are, however, of a frivolous nature.

At most the finality of an analysis of the facts reduces this application to an attempt to predicate misconduct and partiality upon an assumption of error in judgment. Such an assumption cannot be made the basis for a *vacatur* of the award. Perverse misconstruction or positive misconduct must be plainly established. Matter of Wilkins, *supra*.

But the defendant contends that, even if she has not shown misconduct on the part of the arbitrators, the award must be vacated for the reason that it was made on Sunday and is, therefore, void. This statement is misleading for, although the award was discussed and practically agreed upon on Sunday, it was not made, published nor delivered until the following day.

It follows that the motion must be denied, with ten dollars costs.

Motion denied, with ten dollars costs.

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THE PEOPLE ex rel. LISPENARD STEWART, Individually, Etc., et al. *v.* THOMAS L. FEITNER et al. (2 proceedings).

THE PEOPLE ex rel. DAVID W. BISHOP *v.* THOMAS L. FEITNER et al.

THE PEOPLE ex rel. JOSEPH PULITZER *v.* THOMAS L. FEITNER et al. (3 proceedings).

THE PEOPLE ex rel. JOHN WANAMAKER *v.* THOMAS L. FEITNER et al. (3 proceedings).

THE PEOPLE ex rel. PETER LORILLARD et al. *v.* THOMAS L. FEITNER et al.

THE PEOPLE ex rel. R. M. GALLAWAY *v.* THOMAS L. FEITNER et al. (2 proceedings).

THE PEOPLE ex rel. FLORENCE B. C. BISHOP et al., as Executors, *v.* THOMAS L. FEITNER et al.

THE PEOPLE ex rel. ERNEST E. LORILLARD et al., as Trustees, *v.* THOMAS L. FEITNER et al.

THE PEOPLE ex rel. WILLIAM RHINELANDER, as Executor, et al. *v.* THOMAS L. FEITNER (6 proceedings).

THE PEOPLE ex rel. DAVID W. BISHOP, Jr., *v.* THOMAS L. FEITNER et al.

(Supreme Court, New York Special Term, March, 1907.)

Taxes — Equalization, correction and review of assessments — Certiorari — Review — Reference.

Where in certiorari proceedings, twenty-one in number, brought by eight separate and distinct sets of relators to review assessments for taxation for two or more years of various large parcels of improved real estate in the city of New York, the issue is that the relators' property is assessed higher in proportion to its value than other property in the tax rolls, and it is clear that the testimony of experts, whose time is so occupied that it might well be impossible to assemble them and to keep them together for the purpose of trial in court, will be offered in evidence and that the interests of justice require that ample opportunity to cross-

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examine them and to introduce testimony in rebuttal should be afforded, the court, in the exercise of the discretion conferred upon it by section 253 of the Tax Law (L. 1896, ch. 908), may send the proceedings to various referees under orders containing such reasonable provisions for expediting the proceedings as may be agreed upon.

MOTION to refer above-entitled proceedings to referees to take the testimony and to report with opinion.

Bowers & Sands, for relators.

William B. Ellison, Corporation Counsel, for respondents.

BLANCHARD, J. This is a motion to refer the proceedings above entitled to referees to take testimony and to report with opinion. These proceedings are brought by writ of certiorari to review assessments for taxation, during the years 1899, 1900 and 1901, against various large parcels of improved real estate in New York city. The proceedings are twenty-one in number, and are brought by eight separate and distinct sets of relators, and in the instance of every parcel a review of the assessment for two or more of the years above mentioned is asked. Since the parcels upon which a review of assessment is asked are very valuable, including such buildings as the Pulitzer building, the Wanamaker building, the Cammeyer building and similar valuable structures, it is clear that the testimony of the very best experts, men whose time is so occupied that it might well be impossible to assemble them and keep them together for the purpose of trial in court, will be offered in evidence, and that the interests of justice require that ample opportunity to cross-examine these witnesses and to introduce rebutting testimony should be afforded. As the affidavit of the assistant corporation counsel shows, the experience of the past proves that these ends may best be accomplished in hearings before a referee rather than by trial in court, and in only a very few instances, and those involving real estate of less importance than that in the present case, and requiring merely about one

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day to try, has the court in recent years tried proceedings for the review of assessments of real property. Since the issue, in all the present cases, is that the relators' property is assessed higher in proportion to its value than other property in the tax-rolls, it is clear that proof of value of large numbers of parcels will be offered. Thus, in the People ex rel. Stewart v. Feitner, 95 App. Div. 481, the relator offered proof of the value of about 577 parcels and the defendants of about 123. In People ex rel. Western Electric Co. v. Feitner, 96 App. Div. 615, the relator offered proof of about 145 parcels and the defendants of about 50. In the Mutual Reserve case, N. Y. L. J., Dec. 19, 1905, the relator offered proof of about 60 parcels and the defendants of about 266. Since the value of the property involved in the present proceedings shows every promise that the proof will be as thorough as in the proceedings above mentioned, the advantages of taking testimony before a referee, rather than in court, are apparent. Accordingly, the court is disposed to exercise the discretion conferred upon it in such proceedings by section 253 of the Tax Law, and to refer these proceedings to various referees. The court will make orders containing such reasonable provisions for expediting these proceedings as the parties may agree upon, following the lines suggested in the affidavit of the assistant corporation counsel.

Ordered accordingly.

THE PEOPLE ex rel. PRESCOTT SLADE, Relator, *v.* THE COMMISSIONERS OF TAXES AND ASSESSMENTS OF THE CITY OF NEW YORK, Defendants.

(Supreme Court, New York Special Term, March, 1907.)

Taxes — Persons, objects and interests taxable — In general — Deductions — Debts for the purchase of non-taxable property.

A stock exchange seat is non-taxable property; and, where the purchaser of a seat in the New York Stock Exchange, in compliance with its constitution and by-laws and in order to obtain its assent to the transfer of the seat and his admission to membership,

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procures from the person from whom he borrowed the purchase price a general release to him of all claims and demands arising out of the loan, which is delivered to the exchange, and, thereafter, realizing the moral obligation, he promises to pay the lender the amount of the loan with interest, he is not, under section 6 of the Tax Law (L. 1896, ch. 908) which provides: "No deduction shall be allowed in the assessment of personal property by reason of the indebtedness of the owner contracted or incurred in the purchase of non-taxable property", entitled to deduct the amount of the loan from his personal assessment.

MOTION to quash or supersede a writ of certiorari.

Brownell & Patterson, for relator.

William B. Ellison, Corporation Counsel (Curtis A. Peters, of counsel), for defendants.

LEVENTRITT, J. The defendants move to quash or supersede the writ of certiorari issued herein, on the ground that the petition does not set forth facts sufficient to show an assessment erroneous for illegality. The relator does not claim overvaluation or inequality, but asserts an illegal assessment for the year 1906, in that the defendants refused to allow a deductible indebtedness. If allowed, there would have been no taxable personal property. The item in dispute amounts to $77,000 and was incurred indirectly in the purchase of a seat in the New York Stock Exchange under the following circumstances: In May, 1902, the relator purchased the seat, borrowing for that purpose the sum of $77,000. Cited before the committee on admissions of the Exchange, he was advised, upon the disclosure of facts, that, pursuant to the constitution and rules of the Exchange, the transfer of the membership to him and his consequent admission would not be consented to except upon the condition that the person from whom the money had been borrowed would deliver a general release to him of all claims and demands arising out of the loan. The relator procured such a release, and delivered it to the secretary of the Exchange. Subsequently to the execution and delivery of the release, the relator, to quote his petition, "realizing the moral obligation

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on his part to his said creditor, promised and agreed to and with him to pay him the said sum of $77,000, with interest, and has since that time paid interest thereon at the rate of six per cent. per annum."

On these facts I am of opinion that the defendants acted in accordance with law in refusing to allow the deduction.

Section 6 of the Tax Law provides: "No deduction shall be allowed in the assessment of personal property by reason of the indebtedness of the owner contracted or incurred in the purchase of non-taxable property."

That a seat on the New York Stock Exchange is property is settled. Platt v. Jones, 96 N. Y. 24; Powell v. Waldron, 89 id. 328; People ex rel. Lemmon v. Feitner, 167 id. 1. How far it is property within the meaning of the Tax Law (Laws of 1896, chap. 908) depends on the nature of the tax. Under the sections relating to taxable transfers (Tax Law, *supra*, art. 10), it has been held to be property subject to taxation solely by virtue of definitions made applicable to the transfer tax. §§ 220, 242; Matter of Hellman, 174 N. Y. 254. On the other hand, it has been held to escape annual taxation locally because of the failure to include it within the definition of personal estate or personal property in subdivision 4 of section 2 of the Tax Law. People ex rel. Lemmon v. Feitner, *supra*.

Not being subject to the local tax, a stock exchange seat becomes nontaxable property. The relator argues ingeniously that it is not nontaxable but rather nontaxed property. While there may be force to the argument etymologically the Court of Appeals has included, in its construction of section 6, property that is inherently nontaxable and exempt, as well as that which has intentionally or accidentally escaped inclusion. People ex rel. Cornell Steamboat Co. v. Dederick, 161 N. Y. 195, 209. In that case the relator sought to deduct from its assets one-half of its bonded indebtedness incurred in the purchase of the good-will of the business of a company acquired by it. The deduction was not allowed. Good-will was declared to be property, though intangible, but as in the Lemmon case, *supra*, not included within the definition of personal property as defined in sec-

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tion 2. In its conclusion the court says: "It * * * follows that good-will is not taxable property for * * * municipal purposes and that debts or liabilities contracted in the purchase of such property should not be deducted from the value of the taxable personal property." There is no distinction in principle under the Tax Law between the good-will of a business and a stock exchange seat. Both are not taxed and "nontaxable" within the meaning of section 6 as defined by the highest court.

The relator contends further, however, that the indebtedness he seeks to deduct was not incurred in the purchase of the stock exchange seat. While not directly incurred, it was indirectly. Had there been no purchase of a seat there would have been no obligation of $77,000 to anybody. Just as the law seeks to avoid double taxation, it seeks to prevent double deductions. If property is exempt and it be allowable to deduct a liability directly or indirectly incurred in the purchase thereof from other personal property that is not exempt, a double deduction would result. The relator has, of course, acted with the utmost good faith; but it is not essential to show fraud or the intention to evade taxation. People ex rel. Bijur v. Barker, 155 N. Y. 330. The fact remains that the liability sought to be deducted owes its inception to the acquisition of a species of nontaxable property. It has been indirectly "incurred in the purchase" thereof. It may well be that, for ordinary contract purposes, a new obligation has been incurred to the creditor who may not be able to assert any rights under his original claim by virtue of the general release he has given (Sterling v. Chapin, 185 N. Y. 395); but the relations between debtor and creditor do not control the inquiry under the Tax Law. On the ground that the liability was indirectly incurred in the purchase of nontaxable property, the motion should be granted.

Motion granted.

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Matter of the Application of the LAKE SHORE & MICHIGAN SOUTHERN RAILROAD COMPANY for the Appointment of Commissioners to Ascertain the Compensation to be Made for Certain Lands, Etc., Claimed to be Owned by IDA DICKINSON and Others.

(Supreme Court, Erie Special Term, March, 1907.)

Eminent domain — Condemnation proceedings — Petition — Amendment of petition — Terms.

Where the petition of a railroad company in condemnation proceedings, in describing the strip of land to be taken adjoining its right of way, excepted so much of the premises described "as is included within the lines of the highway", because petitioner's attorney was misled by the official search into the belief that the defendants had no title to the highway, and the mistake is discovered before an award is made, the petition, under section 721 of the Code of Civil Procedure, made applicable to condemnation proceedings by section 3368 of said Code, may be amended so as to include in the description of the property to be taken the highway itself.

But, where the railroad company, while an action is pending by the owners of the highway to restrain it from entering thereon, obtains an order permitting it to go into immediate possession upon depositing $5,000, which is done, the amendment will be granted on condition that the petitioner pay all taxable costs to date in said action and also all witnesses' fees paid and taxable on the part of the owners in the condemnation proceedings to the date of the order, together with an allowance to their attorney upon the motion to amend and as compensation for his appearance to date before the commissioners.

MOTION on part of the railroad company to amend its petition and other proceedings by amending the description of the parcel of land to be taken.

Thomas D. Powell, for motion.

E. C. Crandall, opposed.

WHEELER, J. The land proposed to be taken consists of a strip of land some one thousand eight hundred and twenty-five feet in length by twenty feet wide at one end and some forty-three feet at the other, adjoining the petitioner's right

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of way. A highway runs across the strip, and it now appears that the parties defendant to this proceeding own the fee of the highway, although the petition, in describing the parcel to be taken, excepted so much of the premises described "*as is included within the lines of the highway.*" The affidavits disclose that the highway was excepted because the petitioner's attorney was misled by the official search into the belief that the defendants had no title to the highway, but that the mistake has since been discovered, and an amendment is now asked so as to include in the description of the property to be condemned the highway itself.

It goes without argument that the entire damage to be paid the owners should be ascertained in one proceeding and the petitioner not driven to institute a separate and distinct proceeding for the mere fee in the highway, and this application should not be denied if the court has the power to grant it. The power of the court to allow this amendment, however, is challenged by the counsel for the owners.

Section 3368 of the Code of Civil Procedure makes section 721 applicable to condemnation proceedings, and this section is very broad in its provisions and authorizes amendments where the adverse party has not been prejudiced. We cannot see how the owners can be prejudiced by the amendment.

In the case of Prospect Park & Coney Island R. R. Co., 67 N. Y. 378, an amendment was allowed by which a strip of land of less width than originally described was substituted, and the court said that, under the circumstances of that case, a further attempt at an agreement on price did not appear necessary.

The affidavits presented in this case show that the negotiations with the owners related to all their interest in the strip, that in the highway as well as that on either side. So the owners cannot be said to be prejudiced.

If an amendment for a less quantity of land be permissible. I cannot see why the fee of the land in the highway cannot also be brought in by amendment. The owner cannot possibly be prejudiced by such an amendment where the commissioners have not yet made their award, and if necessary the testimony before them may be begun *de novo.*

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This amendment, however, must be upon terms.

It appears that an injunction action is pending, brought by the owners against the petitioner, to restrain it from entering on the land within the highway. It also appears that in this proceeding the petitioner obtained an order permitting it to go into immediate possession on depositing $5,000, which has been done. As the effect of this amendment and an award under it will operate to practically terminate the action for an injunction, as a condition of permitting the amendment, the petitioner must pay all taxable costs to date in the injunction action; it must also pay all witnesses' fees paid and taxable on part of the owners in their proceeding to date, and also fifty dollars to the owners' counsel or attorney for opposing this motion and as compensation for his appearance before the commissioners in this proceeding to date.

Let an order be entered accordingly.

Ordered accordingly.

Matter of AMSTERDAM AVENUE Between One Hundred and Twenty-ninth and One Hundred and Thirtieth Streets.

(Supreme Court, New York Special Term, March, 1907.)

Eminent domain: Condemnation proceedings — Hearing by commissioners — Admissibility and rejection of evidence — Evidence given on former hearing; Measure of compensation — In general — Valuing lot with open exposure as inside lot.

In a proceeding to acquire lands for streets in the city of New York, where the report of the original commissioners of estimate and apportionment was not confirmed and new commissioners were appointed who were directed to reconsider the previous report and the subject matter thereof and return it corrected and revised or to make a new report, it was error to reject portions of the testimony given before the first commissioners when offered by property owners

A lot having a space of twenty-five feet between it and the building on the adjoining property, giving it light and air on three sides, should not be treated as an ordinary inside lot, although the city owned the adjoining property and might build upon it.

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MOTION to confirm the report of commissioners.

Edward H. Hawke, Jr., for claimant.

Wm. B. Ellison, Corporation Counsel, for city of New York.

BLANCHARD, J. This is a motion to confirm the report of commissioners of estimate and appraisal. Two sets of commissioners have been appointed in this proceeding. The first commission reported and both the city and owners of the property opposed the confirmation of its report, and it was rejected by the court and new commissioners were appointed, and it is their report which is now before the court for confirmation. In appointing this new commission the court directed it to reconsider the previous report, and the subject-matter thereof, and return it corrected and revised, or to make a new report. The first commission appointed estimated the damages of the property-owner at $32,000, and the second commission estimated the damages at $27,000. The owner opposes the confirmation. During the hearing the property-owner offered in evidence certain portions of the testimony given in the hearing before the first commission and it was rejected. I think this was error in view of the language of the order appointing the commission. If the report of the previous commissioners was to be reconsidered by the new commission, it would seem that the testimony on which it was based should also be considered by it. Moreover, I am of the opinion that the commission erred in treating the property to be taken as an ordinary inside lot. There was a space of about twenty-five feet between it and the building on the adjoining property, which gave it an advantage over an ordinary inside lot, in that it thus had light and air on three of its sides. While the circumstance that the city owned the adjoining property and possessed the right to build upon it any time might lessen if not destroy the value of the advantage referred to, it is, nevertheless, an element of damage which the commissioners should have taken into consideration. The report will be referred back

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to the same commission to take into consideration the testimony given in the first commission and the value, if any, of the advantage of the property in question not being an ordinary inside lot.

Ordered accordingly.

Matter of the Annual Election of THE EMPIRE STATE SUPREME LODGE OF THE DEGREE OF HONOR, a Corporation.

(Supreme Court, Erie Special Term, March, 1907.)

Corporations — Officers and agents: In general — Election of officers — Notice; Remedies to contest election — Notice of contest — Proof required — Estoppel.

Insurance companies — Organization and conduct of business — Reorganization — Effect upon original company — Authority of former officers continues.

Where a corporation, organized pursuant to L. 1883, ch. 175, as a co-operative assessment association, is afterward re-incorporated under the General Insurance Law (L. 1892, ch. 690) and its articles of incorporation provide for a board of directors whose number and term of office are not stated, the executive committee of the original corporation after the re-incorporation not acting in pursuance of the provisions of the General Insurance Law, nor in pursuance of the General Corporation Law, have no power to adopt by-laws fixing the number and term of the directors.

An election of directors, held pursuant to by-laws thus adopted and not published as required by subd. 5 of section 11 of the General Corporation Law, is invalid; and the directors are not legally elected nor entitled to administer the affairs of the company.

Section 27 of the General Corporation Law, providing for the judicial review of elections of directors of corporations, is not limited in its application to stock corporations but applies to all kinds of corporations; and notice of the application for such review to the corporation and to the directors claiming to have been elected is a sufficient compliance with the requirement of notice to the adverse party or to those to be affected thereby; and notice to the policy holders of an insurance corporation is not required; and under that section the court has power, upon the application of policy holders, to annul an election without regard to the remedy by application to the Attorney General under section 1948 of the Code of Civil Procedure.

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Where the question is as to the legal right to hold any election at all, and not who received a majority of the legal votes cast, it is not required of the applicants to show that a new election would result differently.

Nor are the applicants estopped from questioning the legality of the election because, after publication of a notice of an annual meeting without mention of any election, in the official organ of the association, they failed to appear at the meeting and object to the election; and failure to attend such meeting is not tantamount to acquiescence in proceedings taken thereat.

By the re-incorporation under the General Insurance Law, the existence of the original corporation was not destroyed but it was continued under and subjected to the provisions of the Insurance Law; and the old officers remained in office and had the right to direct its affairs until their successors were chosen, and all by-laws not in conflict with the new law remained in force. The court should not take the management of the corporate affairs from such officers and confide it to the persons claiming to have been elected directors under the pretended election; but the latter should be ousted from control and the management of the corporate affairs should be returned to the former officers until a regular election can be had.

THIS is a proceeding, instituted under section 27 of the General Corporation Law, to review the election of nine directors claimed to have been chosen at the annual meeting of the association held on June 19, 1906.

The essential facts will be stated in the opinion of the court, which follows.

Frank W. Stevens, for petitioners.

Simon Fleischmann and Herman Westwood, for respondents.

Lester F. Stearns, for certain policy-holders.

WHEELER, J. The corporation was originally incorporated in the year 1886, pursuant to chapter 175 of the Laws of 1883, authorizing the incorporation of co-operative assessment associations. In January, 1906, it was reincorporated under the provisions of section 206 of article VI, chapter

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690 of the Laws of 1892, as amended, being the General Insurance Law. It had a constitution and by-laws governing its corporate action, which provided for its management by an executive committee consisting of the president, vice-president, secretary and two members of the association, elected at the annual meeting of the association each year; and these officers were, by the same constitution, to hold office until their successors should be elected or appointed. These officers were in control of the company's affairs at the time of the reincorporation of the association, and continued in control down to the 19th day of June, 1906, when a meeting was held and the nine respondents in this proceeding were elected, or claim to have been elected, directors of the association. Three of these gentlemen are claimed to have been chosen by the policy-holders of the association as directors for one year, three for two and three for three years. These nine men thereupon took upon themselves the management of this association as such directors, and this proceeding is now brought by three policy-holders of the association to review the election and to oust the respondents, the contention of the petitioners being that the election mentioned was wholly illegal and void.

The declaration effecting the reincorporation of the association provided as follows:

"The mode in which the corporate powers of the said corporation shall be exercised will be pursuant to its constitution and by-laws and amendments thereto, by a body known and designated as the General Council, which shall be composed of the certificate or policyholders of the said corporation.

"At all times when said General Council shall not be in session the corporate powers of said corporation shall be exercised by a board of directors chosen or elected by the General Council in such manner as shall be prescribed by the by-laws of said corporation, which board of directors shall exercise the general control and management of the affairs and of the funds of said corporation," etc.

The articles of incorporation, therefore, do not assume to provide for the number or the term of such directors, or the

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manner or time of their election, but remit all such particulars to by-laws of the corporation to be properly adopted by the association.

On the 15th of June, 1906, four members of the executive committee assumed to adopt a code of by-laws for the association, which by-laws provided for the election of nine directors for the terms named.

The petitioners, however, contend that the executive committee had no power or legal authority to adopt or prescribe by-laws for the association, either under the by-laws as they existed prior to the incorporation, or under the General Insurance Law under which the association was reincorporated.

Section 209 of the Insurance Law provides as follows: "Every such association, corporation or society, other than secret fraternal societies now authorized to do business in this state, *must* hereafter, before the adoption of any by-law, or amendment thereto, cause the same to be mailed to the members and directors of such association, society or corporation, together with a notice of the time and place when the same shall be considered, which notice shall be the same as hereinbefore required for stated meetings."

The notice required for such meetings in the same section is as follows:

"Not less than five days' notice of each meeting shall be given to each director and to each member and policy holder, who shall have been such for thirty days, in such manner as the by-laws direct, except that in lieu thereof such notice may be given to a subordinate body of a society having a grand or supreme body, or to a local board subordinate to the association."

It is conceded that the body of policy-holders in this association were never given or served with any proposed code of by-laws, or with any notice of any meeting where any by-laws were proposed to be considered.

It goes without argument that the Legislature, by the enactment of the provisions of the Insurance Law above quoted, intended to vest in the policy-holders of the association the power to adopt by-laws for its management, and that

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that body alone possessed the power of corporate legislation on that subject.

And by-laws adopted or attempted to be passed by the executive committee touching the number of directors to manage the affairs of the association, or fixing their term of office, must, therefore, be necessarily null and void, unless the old executive committee in management of the affairs of the association had the power to adopt such by-laws by virtue of the provisions of section 29 of the General Corporation Law, the latter part of which section reads: "Subject to the by-laws, if any, adopted by members of a corporation, the directors may make necessary by-laws of the corporation." The power, however, conferred by this clause is qualified and limited by the latter part of subdivision 5 of section 11 of the General Corporation Law declaring that: "No by-law adopted by the board of directors regulating the election of directors or officers shall be valid unless published for at least once a week for two successive weeks in a newspaper in the county where the election is to be held, and at least thirty days before such election."

We, therefore, cannot escape the legal conclusion that no by-laws binding on any policy-holder of the association were ever adopted, and the rights of the parties to this proceeding must be determined as though no by-laws were ever attempted to be adopted; for there was not and could not be sufficient time between the 15th of June and the 19th of June, 1906, to comply with the requirements of the subdivision last quoted. When the annual election was held, only about 1,500 votes out of a total membership of about 9,000 were cast. Most of these votes were cast under proxies claimed to have been obtained.

We cannot understand how directors, chosen under the circumstances stated, can claim to have been legally elected, or entitled to administer the affairs of this company. The members or certificate-holders in this association are entitled to determine in the manner pointed out by the statute, by the adoption of an appropriate by-law, not only the number of directors who shall administer the affairs of the association, but also the duration of their terms of office; whether

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all shall be chosen annually, or only a portion of the board shall be elected each year. They have never had the opportunity even to be heard on those questions. In fact no notice of any legal election has ever been given to the policy-holders, and we are forced to the irresistible conclusion that the respondents have no legal claim to the office they now fill and that the election was illegal and void.

The contention of the respondents that section 27 of the General Corporation Law, under which this proceeding is instituted, is not applicable to an insurance company organized upon the co-operative or assessment plan, I do not deem sustainable. The argument made is that this is not a stock corporation having capital stock divided into shares with a registered ownership entitling the holder of each share to a vote for directors. The twenty-seventh section is a part of the General Corporation Law. It forms one of the sections of a distinct chapter relating to corporations generally. This chapter classifies and relates to all kinds of corporations, and its provisions define how the powers and privileges of corporations may be exercised, whether organized as a stock corporation or a nonstock corporation, whether a moneyed corporation, a business corporation, or a membership corporation. The terms of the twenty-seventh section of this chapter are general, giving the Supreme Court power to review elections "*of any corporation*" without any limitation as to its application; and there appears no good reason why the powers of review conferred should not be exercised to correct an election held by an assessment insurance company, as well as that of a stock corporation.

It is also urged that, as the twenty-seventh section of the General Corporation Law requires notice of the application "*to the adverse party, or to those to be affected thereby,*" the provisions of the section are not complied with by notice to the corporation and to the board claiming to have been elected, but that notice should have been given to the 9,000 policy-holders of the company as well. Such a construction would render fruitless the remedies intended to be given by this statute. For, in a great majority of corporations, the stockholders indirectly interested are so large that it would

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be impracticable, if not impossible, to give notice to all; and, if all are entitled to notice, the hearing could not proceed until each had been given the proper notice. We cannot believe that the Legislature intended the impracticable; and we are of the opinion that notice to the corporation itself and to the members of the board of directors, the legality of whose election is challenged, meets all the requirements of the section. This construction is upheld in The Schoharie Valley Railroad case, 12 Abb. Pr. (N. S.) 394.

Again it is urged that the petitioners are not persons legally aggrieved within the meaning of the twenty-seventh section, and that the proper remedy is to apply to the Attorney-General to proceed under section 1948 of the Code. Whatever relief is possible under section 1948, the court also has power to annul an election under section 27 of the General Corporation Law and it is not necessary that the Attorney-General should proceed under section 1948. Matter of Northern Dispensary, 26 Misc. Rep. 147.

The respondents further contend that the petitioners' position is materially defective in that they do not show that a new election would result differently from the one complained of. It is true that, where an election is held at a regular time and under proper authority, and the only question under dispute is as to whether a given director or set of directors have received the necessary votes required to legally elect to office, in such cases a person attacking an election must show that he has been injured by the declared result, and that, but for the illegal exclusion of votes offered or the reception of votes not entitled to be received, the result of the election would have been different. Ex parte Murphy, 7 Cow. 153; People ex rel. Bush v. Thornton, 25 Hun, 456; Matter of Long Island R. R. Co., 19 Wend. 37; Matter of Argus Co., 138 N. Y. 557; Waterbury v. Merchants' Union Express Co., 50 Barb. 157.

But the case now under consideration is a very different case from any of those above cited. In this case the right to elect any directors at all is challenged until a proper constitution and by-laws have been adopted, fixing the number of directors who shall manage the affairs of the association, de-

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termining the date of the election and providing for other details of management. It is not a question here of who received a majority of the legal votes cast, but a question as to the legal right to hold any election at all. Where the question presented is as to the legality of any election at all, then certainly any member of the corporation must of necessity have a standing in court to test the right to hold an election and to set aside an election if one is illegally held, no matter what result may have been shown by the ballot. As a matter of fact, it appears that, out of a total membership of about 9,000, but about 1,500 votes in all were cast, and most of them by proxy. In any event, it is quite clear to the mind of the court that the petitioners are not required to show in the event of a legal election other directors than those assuming to hold office would be chosen. The petitioners have the right to insist upon a legal and duly authorized election.

Neither do we agree with counsel for the respondents that the petitioners are estopped from questioning the election because three notices of the annual meeting of policy-holders to be held June 19, 1906, were printed in the official organ of the association known as the Empire State Degree of Honor Journal. The argument of counsel is that their failure to appear at the meeting at the time named and raise objections to proceeding with the election is tantamount to acquiescence, and that the petitioners are, therefore, estopped from now maintaining this proceeding to set the election aside.

These articles appearing in the Journal were, properly speaking, no notices at all of any election of directors. No notice was given in them that any directors would be then chosen, or any election had. The most that can be said for these articles is, that they referred to the annual meeting, and one was a notice of the annual meeting without any intimation that nine directors, or any other number, to manage the affairs of the association, were to be elected.

These articles do not rise to the dignity of official notices of an election. But even assuming that they did, I cannot see that the petitioners, or any one else, were required to respect such a notice, or to attend any meeting so called for

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an election. If a legal election of directors could not be held until their office had been properly provided for by the proper adoption of a proper constitution or code of by-laws for the organization and government of the corporation, then no policy-holder was bound to respect a call for such an election, prematurely made, and cannot be estopped from questioning such an election by failing to attend and protest. He had the clear right to remain away and stand on his legal rights. We must now consider, briefly, the practical effect of the illegal election of June nineteenth, as bearing on the question of the proper management of the affairs of the association until a legal election can be held.

The reincorporation of the association under the Insurance Law of the State did not operate to create a new corporation. Its only effect was to subject the corporate entity to the control and provisions of the Insurance Law, and to confer upon the association the powers and privileges given by that law. The membership of the association remained unchanged. Its assets became the assets of the new association. The contracts of the old association became the contracts of the new, and the liabilities of the old became the obligations of the new. There was no change in name of the association. The statute under which the reincorporation took place provides for no immediate change in the officers or managing agents. It was the manifest intent of the statute that there should be no change in the corporate entity, but that existing co-operative or assessment societies, by filing the required declaration, might bring themselves under the provisions of the Insurance Law and enjoy the benefits and privileges of that act. Under such circumstances, the decisions are uniform that the reincorporation does not operate to create a new and distinct corporation, but is simply the continuation of the old under a new law. City National Bank of Poughkeepsie v. Phelps, 97 N. Y. 44; Matter of Kansas City Smelting Co., 13 App. Div. 50; Metropolitan National Bank v. Claggett, 141 U. S. 521; Atlantic National Bank v. Harris, 118 Mass. 147; Michigan Ins. Bank v. Eldred, 143 U. S. 293.

If this be true, then the old officers of the association,

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notwithstanding the reincorporation, remained the managing officials of the company and had the right to direct its affairs until their successors were legally chosen. The by-laws of the association in force prior to the reorganization, in so far as they did not conflict with the provisions of the act under which the association was reincorporated, were of force and effect. In the event of a failure to hold any election of directors, the so-called executive board of this association was legally authorized to continue to manage the affairs of the association; for section 23 of the General Corporation Law provides: "If the directors shall not be elected on the day designated in the by-laws or by-law, the corporation shall not for that reason be dissolved; but every director shall continue to hold his office and discharge his duties until his successor has been elected." The by-laws in force prior to the reincorporation also provided for the election of the officers who should compose the executive committee, "who shall each hold office for one year and until a successor shall be elected or appointed."

If, on the other hand, there was held an illegal election, such as conferred no legal claim to the office of director upon any one, then the old members of the executive committee should have continued to act as the managing board; and the pretended election of their successors could not have changed their legal status as the *de jure* officials of the association. The court is asked to continue in office the nine directors chosen at the illegal election of June nineteenth (even though it concludes to set aside such election), until proper by-laws are adopted and directors are legally chosen.

In this suggestion the court cannot concur. It would be committing the management of the affairs of the association to parties not legally entitled to the same. The statutes have designated the legal managers until a proper election can be held. Such managers are the former executive committee of the association.

The election of the respondents on the 19th of June, 1906, must be declared illegal, and the said nine directors ousted from control. The future management of the affairs of the

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association should be returned to the former executive committee until a regular election can be held.

The executive committee should proceed forthwith to submit to the members of the association proposed by-laws and call a meeting for their consideration and adoption as required by statute in such case made and provided and, immediately thereafter, call a special meeting of the members of the association for the election of directors in accordance with the provisions of such by-laws when so duly adopted.

Let such an order be drawn and settled upon five days' notice to the attorneys of the respondents.

Ordered accordingly.

Matter of the Application of JOHN FREUND to review the Determination and Decision of the Village Clerk of Hastings-on-the-Hudson.

(Supreme Court, Westchester Special Term, March, 1907.)

Election of officers — Nominations and preparation of official ballot: Primary — Notice; Certificate — Sufficiency.

A paper purporting to be a certificate of nomination for village officers, made by the Independence League at a primary, is not sufficient to warrant placing the names of the candidates upon the official ballot, where it appears that no sufficient notice of the primary was given; that the only public notice given was not subscribed by any committee or officer of the Independence League and that the primary was not called by any such committee or officer.

APPLICATION to review the determination of the village clerk of Hastings-on-the-Hudson sustaining objections to an alleged certificate of nominations of the Independence League for village officers.

Clarence J. Shearn, for motion.

Charles D. Millard, opposed.

TOMPKINS, J. It seems from the papers before me that in the incorporated village of Hastings there is, and for

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some time past has been, a committee or organization representing the political party known as the "Independence League," and that, on the 1st day of March, 1907, what purported to be a certificate of nominations of the Independence League for village officers was filed with the village clerk. On the next day written objections to the nominations and the certificate were duly filed with the village clerk. The grounds of the objections were:

First. "That no caucus was ever properly called by an authorized committee of the said Independence League."

Second. "That no legal notice, as required by law, was ever given to the electors of the village of Hastings."

Third. "That no nomination has been made by the said Independence League or any one legally authorized by them, in accordance with the Election Laws of the State of New York."

The village clerk gave notice of a hearing, as required by the Election Law; and, thereafter, all the parties appeared before him. Briefs were submitted in support of the objections and in defense of the certificate. The clerk sustained the objections, finding that the certificate of nominations was defective, illegal and void in the following particulars:

First. "The parties claiming to hold such primary or caucus were not members of the Independence League, and did not legally represent said party."

Second. "Notices of such primary were not signed by any person claiming to represent said party."

Third. "Said party did not call any such primary through their duly qualified officers, as shown by affidavits of Nicholas U. Cook, president, and William G. Lawyer, secretary."

Fourth. "Henry C. Brown, who acted as secretary of said caucus and who cast the only ballot claimed to have been voted thereat, having voted at a previous caucus, viz.: the Democratic caucus held on the 19th day of February, 1907, was estopped from participating at any such caucus or primary."

After a careful examination of all the papers and proceedings before the village clerk, it seems quite clear to me

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that the first three of his conclusions were correct, and that the names of the candidates in the certificate of nominations filed by the so-called Independence League should not go upon the official ballot.

It appears that Nicholas U. Cook and William G. Lawyer, respectively, were president and secretary of the Independence League of the village of Hastings; that they never called or caused any person or persons to call a primary or caucus for the purpose of nominating village officers, and that the caucus at which the alleged nominations were made was not called by or on behalf of the officers or any committee of the Independence League.

The caucus or meeting in question was held on Tuesday evening, February 26, 1907. The only public notice, so far as the papers show, of the proposed caucus was posted in one place in said village on February twenty-fifth, between 10 and 11 o'clock in the forenoon. This notice was not signed by any person and did not purport to be signed by any person or committee. At the foot of the notice was the following:

"By order of the committee, per."

and nothing more.

Nine voters attended the caucus, three of whom had previously voted at either the regular Republican or regular Democratic village caucus and, for that reason, had no right to vote or participate in another village caucus.

The officers of the so-called caucus were not sworn and no tellers were appointed. Section 56 of the Election Law provides: "A party nomination of candidates for public office to be voted for, when in a town or ward of a city or a village or subdivision thereof, can only be made by a convention or primary or by a duly authorized committee of such convention or primary of a political party, which at the last preceding general election before the holding of such convention or primary, at which a Governor was elected, cast ten thousand votes in the state for such officer."

The Independence League at the last general election cast more than 10,000 votes in the State and thus became entitled as a political party to nominate village offi-

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cers and to have a column upon the official ballot; but such nominations can only be made at a primary or caucus, or by a properly appointed or duly authorized committee.

The claim here is, on the part of the Independence League, that these nominations were made at a primary or caucus. To hold a lawful village primary or caucus, there must be a suitable call issued or notice given, emanating from the organization representing the political party in the village; and the caucus or primary, when convened, must be conducted in accordance with the provisions of the Election Law.

An affidavit made by William R. Hearst, and verified on the 26th day of February, 1907, the day on which this caucus or primary was held, was submitted to the village clerk in support of the validity of the certificate of nominations and is now before me; and in that affidavit Mr. Hearst says, "that the nominating convention held by such organization last week to nominate candidates of the Independence League for village officers to be elected at the ensuing election in said village, of which convention William Ross was chairman, and H. C. Brown was secretary, was held by virtue of the authority, and by and with the consent and approval of the State Committee of the Independence League, and the candidates nominated thereat are the duly accredited and nominated candidates of the Independence League."

This affidavit was verified in the city of New York sometime during the twenty-sixth day of February. The caucus or primary in question was held between 8 and 9 o'clock on the evening of the same day. Therefore, the statements above quoted from this affidavit cannot have reference to the caucus or primary held on that night. In fact, it distinctly and expressly refers to some nominations made a week before, the validity of which is not now before the court.

Unless nominations for village officers are made by a political party at a regularly called and properly conducted caucus, they can only be made by a petition signed by one hundred or more electors. This provision of the law would

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be nullified if nine men could get together, pursuant to such a notice as was given in this case, claiming to be members of a political party, and make nominations that would be entitled to a place on the official ballot.

"It has become recognized that in our form of government, the primaries, caucuses and conventions of parties should be surrounded by all the safeguards and be conducted with the same conformity to law that our regular elections should be, and the act of the majority is the act of the committee, and where there are no rules governing the actions of the primary, it must be held to the same rules that at common law govern any board or body of officers." Matter of Broat, 6 Misc. Rep. 445; Matter of Redmond, 5 id. 369.

My conclusion is that the meeting at which these nominations were made was not a caucus or primary of a political party within the meaning of the provisions of the Election Law, and that the certificate of nominations filed with the village clerk is defective, illegal and void, and that the determination of the village clerk should be sustained.

Ordered accordingly.

Matter of the Petition of MAYNARD N. CLEMENT, as State Commissioner of Excise, for an Order Revoking and Cancelling Liquor Tax Certificate No. 26,202, issued to MYRTLE F. BRIGGS.

(Supreme Court, Fulton Special Term, March, 1907.)

Intoxicating liquors — Revocation or forfeiture of license — Grounds of forfeiting license — False statements in application — When deemed material.

Where an applicant for a liquor tax certificate states in the application that traffic in liquor was not actually lawfully carried on in the premises on March 23, 1896, and further states that there were only two buildings occupied exclusively as dwellings within two hundred feet of the premises, when, in fact, there were four to his knowledge, the certificate must be canceled, and such cancellation cannot be avoided by showing that the first statement was

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untrue; that traffic in liquors was actually lawfully carried on in said premises on the date mentioned and the statement as to dwellings within the prescribed distance of the premises was, therefore, immaterial.

PROCEEDINGS to revoke and cancel a liquor tax certificate.

Russell E. Healey (William G. Van Loon, of counsel), for petitioner.

H. M. Eldredge, for certificate-holder.

SPENCER, J. In these proceedings it is sought to revoke the certificate solely on the ground that the statement in the application, that there were only two buildings occupied exclusively as dwellings within 200 feet of the premises, is false.

The respondent made no denial of the charge, admitting by her answer that there were in fact three dwellings within the prescribed limits. As the required consents had not been obtained or filed, the issue thus formed required a revocation of the certificate provided the court found that the statement as to the number of dwellings was intentionally false.

But the respondent did not limit her answer to this subject, but alleged that other statements in her application were false and that, in case she had told the truth in respect to those other matters, she would have been entitled to a certificate without the consent of any owner of dwellings. Her application for the certificate contained the usual questions propounded by the excise department, and, by answers thereto, she stated that the traffic in liquor was not actually lawfully carried on in the premises on March 23, 1896; that said premises were not at that time actually occupied as a hotel; that the sale of liquor had only been carried on in said premises since May 1, 1903; and that the same had been used for the purposes of a hotel only since the latter date.

These facts indicated clearly that the premises were not among those classed as privileged, but premises in respect to which consents must be presented or be on file.

It is doubtful whether any issue was raised by the answer, but the matter was sent to a referee to take testimony. Upon

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the coming in of his report, an order was made denying the application to revoke upon the authority of Matter of Moulton, 59 App. Div. 25. The petitioner immediately applied for an opening of the proceeding and for a rehearing of the matter, which application was granted and reargument on the merits had, and this is such rehearing. It calls for a consideration of the case of Moulton, as to whether it is controlling in respect to the issue raised by the petition and answer.

In Matter of Kessler, 163 N. Y. 205, 207, it was held that, in order to justify the revocation of a certificate, "The false statements in an application * * * must relate to some material matter of fact, and it must be shown that such fact was wilfully misstated by the applicant. If the statement relates to some matter of law, as to which the applicant is ignorant or misinformed, that will not be sufficient to warrant the court in canceling a certificate."

I think this may be regarded as a fair and reliable enunciation of the general rule applicable to cases of this kind. But in Matter of Moulton, 59 App. Div. 25, which is claimed to be controlling here, this statement of the Court of Appeals is cited in support of what seems to me to be quite a different proposition. The headnote of that case reads as follows: "Untrue statements contained in an application for a liquor tax certificate will not invalidate the certificate issued upon such application, if the applicant would have been entitled to the certificate had he correctly stated the facts; in such a case the false statements are immaterial."

I seriously question whether the language of the opinion will sustain the proposition thus set forth in the headnote The decision has, however, been affirmed by the Court of Appeals (168 N. Y. 645), on the opinion of the court below. It is, nevertheless, fair to assume that this was done without regard to the language of the headnote. The record which was before the Appellate Division and the Court of Appeals is now before me; and, from a careful examination of the same, I am of the opinion that the proposition contained in the headnote was not in any way involved in the

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issues there raised, nor in any manner necessary for a determination of the case.

The petitioner there claimed that two statements in the application were false, viz., the statement that liquors were sold on the premises, March 23, 1896, and the statement in regard to the proximity of dwelling-houses. The court found that the statement in regard to the sale of liquor on the premises, March 23, 1896, was true and brought the place within the privileged class, and that the applicant was, therefore, entitled to a certificate without consent from property-owners; and that the statement in respect to property-owners, though false, was immaterial for the simple reason that the applicant was entitled to the certificate whether such statement were false or true. This was the only question in the case necessary for the decision.

The enunciation of the headnote is quite a different proposition. If good law, it permits an applicant to obtain a certificate upon false statements and, when revocation for that reason is sought, permits him to sustain it by the substitution of the truth. Such a rule carries its own condemnation.

In the case at bar the applicant in her application swore that traffic in liquor was not carried on in the premises on March 23, 1896; and that such premises were not occupied at that time as a hotel; and that such business had only been carried on there since May 1, 1903. The petitioner does not attack this part of the application. His sole charge is that the applicant's statement in respect to dwelling-houses is false.

The defendant comes into court and, while practically admitting that her statement in respect to the number of dwellings is false, yet, by way of defense, says: "That is not the only false statement in my application. There are several other false statements which I made in ignorance and under a misapprehension and, if those had not been made and I had told the truth in respect to those matters, I would have been entitled to a certificate."

To permit her to do this would establish a rule, whereby an applicant might obtain a certificate upon an application

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that contained no word of truth, and permit him to sustain it by a disclosure of the truth. I do not believe an applicant may be permitted to accomplish such a complete somersault. If so, then a different rule must obtain in these proceedings from that which is applicable in any other proceeding known to the law. But it is said that the case of Moulton, *supra,* expressly so holds and is controlling. I confess I am not able to dispute this, but, as indicated above, I do not regard the language employed as a law binding upon this court. The defendant may not play fast and loose in the manner here attempted. She must stand or fall upon the truthfulness of her own statements. She cannot make immaterial what was clearly material at the time the certificate was issued. I am, therefore, of the opinion that the evidence relating to business done on the premises March 23, 1896, was immaterial and not within the issue; that, having obtained her certificate on the ground that the premises were not privileged and that the necessary consents had been given, she cannot, in proceedings to revoke, make the facts upon which the certificate was granted immaterial by showing that, if she had stated the truth in respect to other matters, she would have been entitled to a certificate on other grounds. A rule of law to the contrary would introduce into these proceedings the utmost confusion and uncertainty and give aid to the grossest deceptions.

We thus come to the question whether the statements, made by her and upon which the certificate was issued, were willfully false within the ruling of Matter of Kessler, *supra.* Her application states that there are only two dwellings within the prescribed limits. By her answer she admits there are three. The proof very satisfactorily shows that there are four. I cannot conceive how she could have been misled or have innocently misstated the number. I am, therefore, of the opinion that the certificate was issued upon false statements, known by the applicant to be false at the time they were made, and that, therefore, the certificate should be revoked and cancelled, with costs.

Ordered accordingly.

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THE PEOPLE ex rel. HENRY ELIAS BREWING CO., Relator v. FRANK GASS, Register of the County of New York, Respondent.

(Supreme Court, New York Special Term, March, 1907.)

Taxes — Taxation of mortgages on real property — What mortgages are taxable — Mortgages upon chattels real.

A lease for five years is a chattel real and does not lose its character after the expiration of two years of the term; and it is, therefore, real property within the meaning of the Mortgage Tax Law (L. 1906, ch. 532).

APPLICATION for a writ of mandamus.

Paskus & Cohen, for relator.

W. S. Jackson, Attorney-General, for respondent.

GREENBAUM, J. The Mortgage Tax Law, as amended (Laws of 1906, chap. 532), provides: "The words real property and real estate as used in this article * * * shall be understood to include everything a conveyance or mortgage of which can be recorded as a conveyance or mortgage of real property under the laws of the state." The Real Property Law defining the term "real property" in connection with its provisions referring to the record of instruments affecting real property declares that it "includes lands, tenements and hereditaments and chattels real, except a lease for a term not exceeding three years." Real Prop. Law, § 240. The lease upon which the mortgage in question was given was concededly a lease for five years. The character or quality of the lease was fixed when it became an executed instrument. It was a chattel real. It lost nothing of its character after the expiration of two years of its term. The position of the relator is that a mortgage given upon this lease before the expiration of two years of its term would be a mortgage upon "real property," but if given upon the same lease after that period it would be a mortgage on "personal property." If the lease after two

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years ceases being a chattel real, there would be no necessity to record the mortgage given herein after that time and no harm would come to the relator from the refusal of the register to record the mortgage unless the mortgage tax which he demands is paid. The granting of a writ of mandamus being discretionary where it is not apparent how any injury can flow to the relator from the action of the register, the writ should not issue.

Application denied.

THE PEOPLE ex rel. THOMAS McGOWAN, Relator, *v.* THOMAS E. MURRAY, Respondent.

(Supreme Court, New York Special Term, March, 1907.)

Municipal Courts — Review — Transfer to another district.
Mandamus — Mandamus against judicial officers — Grounds and defenses — Existence of remedy by appeal.

Where a justice of the Municipal Court of the city of New York, after issue joined and several adjournments of the trial, ordered the transfer of an action from the district over which he presided and in which neither of the parties resided to another district in which the defendant's office for the transaction of its business was situated, his action may be reviewed upon appeal from the final judgment in the action; and a mandamus will not be granted to compel the justice to retain jurisdiction and try the action.

MOTION for a writ of mandamus.

Harcourt Bull, for relator.

Henry B. Smith, for respondent.

GREENBAUM, J. It is conceded that respondent, a justice of the Municipal Court, upon motion of counsel for the defendant in the action of McGowan v. New York City Railway Company, ordered the transfer of said action from the eleventh district, over which said justice presided, to the third district, after issue joined and after several adjourn-

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ments of the trial of the action had been had. It is also conceded that neither party to said action resided within the eleventh district and that defendant's office for the transaction of its business was in the third district. The relator asks for a writ of mandamus compelling the respondent to retain jurisdiction and try said action. The action was not brought in the proper district. Subdivision 4 of section 25 of the Municipal Court Act provides: "4. If the district in which the action or proceeding is brought is not the proper district, the action may, notwithstanding, be tried therein, unless the action is transferred to the proper district before trial upon demand of the defendant made upon or before the joinder of issue in writing or in open court, followed by the consent of the plaintiff given in like manner, or the order of the court. The demand must specify the district to which defendant requires the action to be transferred. The court must make such order when the district in which the action or proceeding is brought is not the proper district, as specified in this section or the next one, if such demand be made." It is evident that a defendant is absolutely entitled to a removal of an action where it is not brought in the proper district, provided the demand is made as above provided, and for improperly refusing to transfer an action an appeal will lie. People ex rel. Jaffe v. Bolte, 35 Misc. Rep. 53; Goldman v. Jacobs, 38 id. 781. In the matter under consideration, unlike the situation presented in the Jaffe and Goldman cases, *supra*, where the aggrieved parties were defendants, the plaintiff complains that the justice had no authority to transfer the action. Mandamus can only issue in this case if it appear that the justice had no jurisdiction to transfer the action and that he refused to retain jurisdiction, notwithstanding it was his clear duty so to do. People ex rel. Allen v. Murray, 2 Misc. Rep. 152. The Municipal Court Act above quoted reads: "If the district in which the action or proceeding is brought is not the proper district, the action may, notwithstanding, be tried therein, unless," etc. It will be observed that it "may," not that it "must," be there tried. It is true that the action "must" be transferred under the circumstances and conditions mentioned in the act, if the de-

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fendant so demand, but it by no means follows that the justice may not order a transfer of the action where it is not brought in a proper district, even though the defendant is not entitled to it as a matter of right, because of his failure to make a demand for the transfer, either "upon or before the joinder" of issue. The justice has exercised his judicial judgment in construing the Municipal Court Act as conferring power upon him to order the transfer of the action to the proper district, even after issue joined, and I am inclined to concur in his view. If it be assumed, however, that the justice had no power to transfer the action, then it would follow that the justice in the district to which it was transferred would have no power, under plaintiff's objection, to entertain jurisdiction, and plaintiff's rights would be safeguarded upon appeal from the final judgment. Plaintiff would thus have an adequate remedy by appeal, and in such case a mandamus would be inappropriate.

Motion denied.

THE PEOPLE ex rel. CHARLES CROWLEY, Relator, *v.* EDMUND J. BUTLER and HARRY G. DARWIN, Individually and as Commissioner and Deputy Commissioner of the Tenement-House Department of the City of New York, Respondents.

(Supreme Court, New York Special Term, March, 1907.)

Municipal corporations — Officers and agents — Officers and employees or agents other than mayor and common council — Resignation, removal, etc. — Investigation of charges and proceedings to remove — Review on certiorari.

Prohibition — Nature and grounds — Existence and adequacy of other remedies — Certiorari.

A veteran employee of the Tenement House Department of the city of New York against whom charges have been preferred, triable before the commissioner and deputy commissioner of the department, has a remedy by certiorari to review the proceedings in case they result in his removal or attempted removal; and a writ of prohibition will not be granted to prevent the officers having jurisdiction from trying the charges.

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MOTION for a writ of prohibition.

Florence J. Sullivan, for relator and motion.

William B. Ellison, Corporation Counsel (William B. Crowell, of counsel), opposed.

GIEGERICH, J. Upon the return to an alternative writ of prohibition an absolute writ is sought upon the grounds, among others, that the defendants have no jurisdiction to try the charges preferred against the petitioner, and that the defendants have not given him an opportunity to be heard in his own defense. Judge Allen, speaking for the court in Thompson v. Tracy, 60 N. Y. 31, 37, said: "A writ of prohibition is to prevent the exercise by a tribunal possessing judicial powers of jurisdiction over matters not within its cognizance, or exceeding its jurisdiction in matters of which it has cognizance." In People ex rel. Hummel v. Trial Term, 184 N. Y. 30, Judge Haight, speaking for a majority of the court, at page 32, said: "The writ does not issue as a matter of right, but only in the sound discretion of the court in cases of supreme necessity where the grievance cannot be redressed by ordinary proceedings at law or in equity or by appeal." Applying the rule of these cases to the present proceeding, it is plain that no sufficient facts have been shown to authorize the granting of an absolute writ. The defendants, upon the facts disclosed, have ample power to inquire into the charges preferred against the relator, and since it appears that he is a veteran of the class specified in chapter 697 of the Laws of 1904 he has a remedy by certiorari to review the proceedings in case it results in his removal or attempted removal. There is, consequently, no necessity for the issuance of an absolute writ. A final order may be entered, upon two days' notice of settlement, denying an absolute writ of prohibition and authorizing the defendants to proceed in the matter as if the alternative writ had not been issued. Code Civ. Pro., § 2100. The question of costs will be determined upon the settlement of the order.

Ordered accordingly.

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LEOPOLD S. SIMONS, Plaintiff, *v.* THE LEHIGH MILLS CO., LTD., Defendant.

(Supreme Court, New York Special Term, March, 1907.)

Attachment — Affidavit to obtain attachment — Affidavit for attachment against foreign corporation.

Since an affirmative allegation that defendant is a foreign corporation would suffice to establish the fact upon a trial in the absence of an affirmative allegation that the defendant is not a corporation, such a positive and unqualified allegation in an affidavit to procure an attachment is a sufficient foundation therefor.

MOTION to vacate an attachment.

Roosevelt & Kobbe, for plaintiff.

C. L. Barber, for defendant.

GREENBAUM, J. The affidavit accompanying the notice of motion to vacate the attachment merely contains the averments necessary to apprise the court of the proceedings taken by plaintiff with respect to the issuance of the attachment and refers to no fact which may tend to controvert or overcome the effect of any allegation in plaintiff's original papers. Under these circumstances the additional affidavits tendered by plaintiff in support of the attachment may not and will not be considered. The attachment is assailed upon the grounds that there was inadequate proof of defendant's nonresidence or of any cause of action in favor of plaintiff against defendant. The latter ground is not now urged upon the brief of the learned counsel for the defendant, for the reason, evidently, that it unmistakably appears that the attachment was granted upon the affidavit and complaint, and the latter paper sufficiently sets forth a cause of action. It is, however, insisted that there was no proof that defendant was a foreign corporation. The plaintiff, the principal in the transaction with the defendant, made the affidavit and verified the complaint upon which the attachment issued. The allegations of defendant's nonresidence are positive and unqualified. Authorities are cited pro and con bearing upon

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the vexed question of the sufficiency of allegations of non-residence in attachment proceedings. The test as to what constitutes proof to uphold a warrant of attachment is whether the evidence presented in the papers would justify a verdict upon the trial. Anthony & Co. v. Fox, 53 App. Div. 200, 203. Section 1776 of the Code of Civil Procedure provides that the plaintiff "need not prove, upon the trial, the existence of the corporation, unless the answer is verified, and contains an affirmative allegation that the * * * defendant * * * is not a corporation." Upon the trial, therefore, of this action, the positive allegation that defendant is a foreign corporation would in itself be sufficient as evidence of that fact, and plaintiff would not be obliged to tender proof upon the allegation even though the answer contained a general denial thereof. This point was considered in Steele v. R. M. Gilmour Mfg. Co., 77 App. Div. 199, 200, 201. What would be sufficient upon the trial, in the absence of affirmative proof, should certainly be ample on the application for a warrant of attachment Anthony v. Fox, *supra,* 203. And in practice no injustice would come to a defendant if, under the circumstances here appearing, the defendant be put to his proof to deny the allegation that it is a foreign corporation. The motion to vacate will be denied, with ten dollars costs to abide the event.

Motion denied, with ten dollars costs to abide event.

JOHN G. WALSH, Plaintiff, *v.* THOMAS F. MARONEY, Defendant.

(Supreme Court, Kings Special Term, March, 1907.)

Place of trial — Residence or domicile of parties — Agent authorized to sue by Domestic Commerce Law (L. 1902, ch. 482).

The place of trial of an action brought by an agent residing in Queens county against a defendant residing in Kings county cannot be properly laid in Madison county where the owner resides, pursuant to L. 1902, ch. 482, and the defendant may require the place of trial to be changed to Kings county.

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MOTION to change venue.

Martin Byrne, for plaintiff.

Hamilton Anderson, for defendant.

CRANE, J. Without passing on those provisions of the Act of 1902 (Laws of 1902, chap. 482), which permit an agent to sue in his name although not the party in interest, I shall hold that the clause reading "Such action may be brought in a court of record having jurisdiction thereof and the place of trial thereof may be laid in the county where such owner, dealer or shipper resides at the commencement thereof" means those actions where the owner, dealer or shipper is a party plaintiff. It does not refer to a case like this.

The owner of the milk can in this case, it is alleged, resides in Madison county; the plaintiff, the alleged agent, it is stated and conceded by his counsel, resides in Queens county, the defendant in Kings county.

As the action could not be properly brought in Madison county, the defendant could properly move for change of venue in the proper county as he has done and his motion is granted, with ten dollars costs of this motion.

Motion granted, with ten dollars costs.

Matter of Examination, etc., THE GERHARD MENNEN CHEMICAL CO. v. "LOUISA" B. DRESSNER (the name "Louisa" being fictitious, real first name unknown to plaintiff).

(City Court, New York Special Term, March, 1907.)

Supplementary proceedings — Procedure in general — Setting aside — Time to move on ground judgment improperly entered.

It is too late for a judgment debtor, after having submitted to an examination in supplementary proceedings, to move to vacate the order for the examination on the ground that the judgment was not properly entered.

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MOTION to vacate order for the examination of a judgment debtor in proceedings supplementary to execution.

James A. Blanchfield, for creditor.

Leach & MacGregor, for debtor.

O'DWYER, C. J. Proof of the facts necessary for the order directing the judgment-debtor to appear for examination was presented to the judge granting the same. The debtor has appeared pursuant thereto and submitted to examination thereunder, and at the end of that examination, upon motion wherein she has appeared by counsel, a receiver of her property has been appointed. It is now sought to vacate the order for her examination upon the ground that the judgment is not properly entered. It is too late to question the regularity of this proceeding, and the irregularity in the entry of the judgment may not now be questioned. Motion denied, with ten dollars costs. See Curtois v. Harrison, 3 Abb. Pr. 96.

Motion denied, with ten dollars costs.

SAMUEL S. CHAMBERLAIN et al., Plaintiffs, *v.* THE CHILDS' UNIQUE DAIRY CO., Defendant.

(Supreme Court, New York Special Term, March, 1907.)

Injunction — Preliminary injunction — Grounds and matters considered — When granted in general — Use of demised premises.

Though the cutting of an arched opening through the wall of the building upon demised premises was unjustifiable and constituted waste, a temporary injunction will not be granted to restrain the tenant's use of the opening as a passageway after its completion, in the absence of proof of special damage and where such use is not in violation of the terms of the lease.

MOTION for an injunction.

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Hotchkiss & Barber, for plaintiffs.

C. J. Shearn, for defendant.

GREENBAUM, J. The act of the defendant in cutting an arched opening in the wall of the demised premises was surreptitious and unjustifiable. It was in violation of the express provisions of the lease and in defiance of the plaintiffs' refusal to consent thereto when permission had been asked. I have no doubt that the act of the defendant was one of waste. In such a case a tenant may be enjoined from committing the waste, where the act is being done or about to be done (Code Civ. Pro., § 1681), or the tenant may be "compelled at once to make satisfaction or to restore the premises to the condition in which he found them." Agate v. Lowenbein, 57 N. Y. 604, 612. It is to be observed, however, that the plaintiff upon this motion for an injunction *pendente lite* only asks to restrain the defendant, its servants or patrons from passing from an adjoining building occupied by it to the demised premises through the unauthorized opening, which forms a passage between the store of defendant in the adjoining building and the store in the premises in question. The opening in the wall had been made a considerable time before the commencement of this action, and the waste complained of was, therefore, a completed act. I fail to understand why an injunction as for an unlawful trespass against the defendant, its servants, agents or customers should be granted in the absence of any proof of any special injury to the plaintiffs. It is not claimed that defendant is not lawfully in possession of the demised premises or that the restaurant business conducted thereon is in violation of any covenant or provision of the lease, nor is any fact alleged that the passage of persons through the opening constitutes any injury to plaintiffs. The case of Orvis v. National Commercial Bank, 81 App. Div. 631, is readily distinguishable from the case at bar in that it there appeared that the business conducted under the lease was in direct violation of a covenant thereof, and it also appears that the work of alteration or waste complained of was in progress when

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the injunction was sought. No such state of facts is here shown. I do not think that the desired injunction is available to plaintiffs, and the motion is, therefore, denied.

Motion denied.

JOHN E. BOWMAN, Plaintiff, *v.* GUSTAVE H. POPPENBERG and JOHN O. CHAPIN, Defendants.

(Supreme Court, Erie Special Term, March, 1907.)

Reformation of instruments—Right to remedy—Grounds—Mistake in supposed duplicate.

Where the parties intend to execute an agreement in duplicate but one of the copies, by mistake, does not conform to the agreement of the parties, parol evidence is competent to show which of the two papers embodies the real agreement, and a case is not presented for the interposition of a court of equity to reform the erroneous copy.

MOTION to dissolve a temporary injunction upon the papers on which the same was granted.

Dudley, Gray & Noonan, for motion.

King & Leggett, opposed.

WHEELER, J. This action is brought for the ostensible purpose of reforming an alleged contract and restraining the prosecution of an action based upon it in the City Court of Niagara Falls. The complaint and affidavits on which this injunction was granted disclose that the plaintiff purchased of the defendants a piano; that the purchase price was $300, to be paid for in monthly instalments without interest. This agreement the parties undertook to evidence by a writing, executed in duplicate upon printed forms furnished by the defendants. The printed form provided for the payment of interest; but, on presentation to the plaintiff for his signature, he objected to the interest clause as not expressing the agreement, and, accordingly, a pencil was drawn through

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that clause, and the duplicate agreement with this change given to him. It is alleged the other copy or duplicate of the written agreement, by neglect or oversight, was not changed and is now in the possession of the defendant Poppenberg. The plaintiff alleges he has paid the $300 called for by the agreement and, by virtue of that payment, the piano in question has become his absolute property. It is alleged, on the other hand, that the defendant Poppenberg claims that, by virtue of the agreement in his possession, some $50 of interest remains unpaid and by the terms of the agreement the piano is still his property, and that he has brought an action in the City Court of Niagara Falls to recover the possession of the piano.

This action is, therefore, brought to reform the alleged agreement, and for a judgment declaring the plaintiff to be the owner of the piano, and to restrain the prosecution of the replevin action in the City Court. It is prosecuted on the theory that the plaintiff has no adequate remedy to protect his right in the action pending in the City Court of Niagara Falls, as that court has no equity jurisdiction. The defendant, on the other hand, contends that all the questions raised can be litigated properly in the City Court, and that, as the plaintiff has an adequate defense to the action in that court, the injunction in this action ought not to be continued. In this view this court concurs.

The question at issue as disclosed by the motion papers is, simply, whether or not the purchase price for the piano was to be paid with or without interest, and that question turns upon whether the duplicate copy of the agreement in the hands of the plaintiff or that in the hands of the defendant is the real agreement of the parties.

In cases like the one now under consideration, where supposed duplicate copies of one agreement differ as to some particulars, it is held that parol evidence is competent for the purpose of showing which of the two papers embodies the real agreement of the parties. McNulty v. Prentice, 25 Barb. 204; Hill v. Miller, 76 N. Y. 32.

It does not appear to be a question of reforming an instrument, but resolves itself into one of identification of the real

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and actual agreement of the parties. Consequently, there is no need for the interposition of a court of equity, but the City Court has ample power to inquire into and decide whether the instrument in the hands of the plaintiff or that in the hands of the defendant was intended to be the agreement of the parties.

There appears, therefore, to be no good reason why the differences of the parties should not be litigated and determined in the City Court.

It is a well-recognized rule that suits in equity to restrain the prosecution of actions at law between the same parties will not be entertained where the questions in dispute can be disposed of in the action at law. Kelly v. Christal, 81 N. Y. 619; Savage v. Allen, 54 id. 458.

These considerations lead this court to the decision that the preliminary injunction should be vacated.

Let such an order be entered, with ten dollars costs of motion.

Injunction vacated, with ten dollars costs.

THE LOZIER MOTOR CO. OF NEW YORK, Plaintiff, *v.* CHARLES P. BALL and GEORGE A. BURWELL, Defendants.

(Supreme Court, New York Special Term, March, 1907.)

Corporations — Officers and agents — Transactions between corporations and officers, etc.— Contracts between corporations and officers or in which officers are interested.

Injunction — Preliminary injunction — Grounds and matters considered — Injunction when right depends on extrinsic facts —Acts tending to render judgment ineffectual.

Where one who is the general superintendent and purchasing agent of a corporation and, part of the time, one of its directors engages in business secretly as a partner with another in manufacturing material used by the corporation in its business and the co-partnership does work for the corporation to a large amount and finally sells out its plant to the corporation, which gives its notes therefor, the corporation, upon subsequently discovering the relation of its superintendent, agent and director to the co-partner-

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ship may maintain an action against the members for an accounting of the profits made by them upon the work of the corporation and the cancellation of its notes and will be entitled to an injunction during the pendency of the action restraining the defendants from negotiating or transferring the notes and from destroying the books or other records of the firm's business and restraining the payment to the former superintendent of the plaintiff of any part of the purchase price of the defendant's plant.

ACTION for an accounting.

Keener, Lewis & Layng (William A. Keener, of counsel) for plaintiff.

Smith, Conway & Weed (Frank E. Smith, of counsel) for defendant Ball.

Weeds, Conway & Cotter, for defendant Burwell.

LEVENTRITT, J. The plaintiff is a corporation engaged in the manufacture of marine boats, motors and automobiles at Plattsburg, N. Y. From about 1900 to September 17, 1906, the defendant Burwell was employed by the plaintiff under a ten-year contract as general superintendent and purchasing agent and, during a portion of that time and up to October, 1904, was a member of its board of directors.

Prior to 1903, the plaintiff experienced more or less difficulty in turning out finished work at its factory, and, therefore, had occasion to contract with outside shops.

On January 1, 1903, the defendants formed the Ball Manufacturing Company and established a plant at Stamford, Connecticut, for the purpose of manufacturing constructive parts and assembling automobiles and the like. The defendants were equal partners in the enterprise, each having invested the sum of $2,000. From the time of the formation of the Ball Manufacturing Company, all work of the plaintiff, which theretofore had been distributed among various outside shops, was sent, at the instance of the defendant Burwell, to the Ball Manufacturing Company. Down to July 10, 1906, that work amounted to about

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$150,000 and the charges therefor were approved by Burwell.

Early in the summer of 1906, the plaintiff began negotiations with Ball for the purchase of the plant of the Ball Manufacturing Company and this was consummated on July 10, 1906, when the plaintiff paid therefor in cash $15,411.17. At the same time it was agreed that there was a balance of $34,369.34 due from the plaintiff for work and materials. For that balance the plaintiff gave Ball its eight promissory notes. The amount paid for the plant was based upon an examination and report made by Burwell. A short time after the acquisition of the plant, the plaintiff discovered, upon an examination of certain books of the Ball Manufacturing Company, that Burwell had been a partner of that company since its inception and had shared equally in its profits with Ball. Thereupon the plaintiff instituted this action, primarily for an accounting by the defendants of the profits realized from the work done for the plaintiff by the Ball Manufacturing Company and of the amounts of such profits accruing to Burwell, now in the hands of either Burwell or Ball, for which judgment is prayed and which it seeks to offset against the eight notes given to Ball. The right to equitable intervention is predicated upon allegations of Burwell's secret connection with the Ball Manufacturing Company; the conduct, concealment and representations of the defendants inducing the purchase by plaintiff of the plant of the Ball Company and the delivery of the promissory notes to Ball; inadequacy of plaintiff's remedy at law and the defendants' irresponsibility. As part of the relief sought, the plaintiff asks for the cancellation of the promissory notes delivered to Ball. This motion is made to enjoin (1) the negotiation or transfer of the notes and the institution of any action thereon; (2) the payment by Ball to Burwell of any part of the $15,411.17 cash consideration paid for the plant of the Ball Manufacturing Company and (3) the destruction, during the pendency of this action, of the books or other records of the Ball Manufacturing Company. The facts thus far detailed are practically undisputed.

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The plaintiff asserts that Burwell's connection with the Ball Manufacturing Company was unknown to it until after the purchase of the plant; but the defendants insist that that fact was known from the outset to Henry A. Lozier, Sr., a former president of the plaintiff. Their story is that he, being the owner of more than two-thirds of the capital stock of the plaintiff, conceived the idea that a factory, devoted to the outside work of the plaintiff, should be started and conducted, to some extent at least, under his control; that he approached Ball with that project; that Ball did not have the requisite means; that he then suggested that Burwell should join Ball in the enterprise which he encouraged by the promise that all the plaintiff's outside work would be entrusted to them; that the Ball Manufacturing Company was accordingly formed; and that Burwell merely fulfilled Lozier's promise by sending all the plaintiff's outside work to the Ball Manufacturing Company.

The facts presented and the circumstances disclosed negative the defendants' story and support the conclusion that Burwell's connection with the Ball Manufacturing Company was never known to the plaintiff. The proof is convincing that Lozier never knew that Burwell was associated with Ball in the Ball Manufacturing Company.

Burwell, in a letter to Lozier under date of December 18, 1902, some months after the alleged suggestion of the latter respecting the formation of the Ball Company, writes:

"Mr. Ball is starting a small machine shop, and I have tried to get him located down close to New York somewhere, and thought that he had everything fixed so that he could start in at Stamford, but just got a letter from him to-day saying that he cannot get accommodations. I want Ball somewhere where we can make use of him and his shop whenever we get pushed. There will be lots more satisfaction sending work to him than there is sending it to Garvin, as he will have time to spend a lot of his personal attention on it, and when he was through with it the work would be done as well on it as we could do it here ourselves."

On December 31, 1902, Burwell wrote to Lozier:

"Mr. Ball is going to make our clutches, and will be able

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to help us out a great deal. He has probably got a year's lease of the shop at Stamford, but might be persuaded to locate at Westchester Creek or anywhere you put up the boat building. There is no question but what we can use him and his shop to good advantage, as he could afford to take on for work a lower figure than what we can get it done at Garvin's, and he would no doubt give us better value in everything he done, as he is a thorough mechanic."

Again on January 3, 1903, Burwell writes to Lozier:

"Regarding Mr. Ball, he has got located at Stamford, and is working for us, and if it is your wish to take up an oil engine there with him, I can arrange it so that this can be done; in fact, as I have told you in a letter several days ago, we can use Ball and his shop perhaps altogether on our work, provided he does not get started on what he has arranged to make.

"If you make use of Ball and his shop the work will have to be paid for about as fast as it is done, as he has got only a small amount of money, sufficient he thinks to do what he is starting out to do."

On April 7, 1903, Burwell writes to Lozier:

"There is another matter I must mention also, and that is that Regar (the plaintiff's treasurer) should be notified to pay Ball's bills promptly. I have discouraged him in taking up the work that he started in to do, and he is depending on us entirely just at present and will be for the next six or eight months, as he cannot get any too many good men in his shop to get the automobile through in time this summer. Kindly let me know if I am carrying out your wishes in this matter, and at the same time settle with Regar regarding paying Ball's bills. Ball writes me this morning that he is short of money and that our Co. is now owing him in the neighborhood of $500 for the clutches and tools, and that his bills are in for them and that he needs the money to keep up his pay roll."

Burwell's letters thus attest the truth of the plaintiff's contention and contradict his own. They point not only to Lozier's ignorance of the membership of the Ball Manufacturing Company but indicate a studious attempt to prevent

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the acquisition of knowledge. Not only did the defendants keep Lozier ignorant of their secret arrangement but they adopted and pursued a general course of concealment lest the fact of their association might reach the plaintiff.

On January 26, 1903, Burwell, on behalf of the plaintiff, in response to an inquiry made of it regarding the financial responsibility of the Ball Manufacturing Company, writes:

"We have yours of the 17th. Referring to the Ball Mfg. Co., would say that we are well acquainted with Mr Ball, he formerly having charge of the Thompsonville plant of the Lozier Mfg. Co. The writer does not hesitate to recommend him to you as being perfectly trustworthy. We are sending the Co. considerable work, but do not know any thing regarding their financial matters. Our acquaintance with Mr. Ball, however, is such that we are firmly of the opinion that he would order only such goods as he is well able to pay for."

On February 26, 1903, Burwell writes to Ball, concerning an employee of the Ball Company:

"I told him in New York that I had nothing whatever to do with your business and that he was there subject to your authority and could only stay as long as he gave you satisfaction * * *. You might give him to understand that my influence would not keep him the position for an hour if he does not suit you; it is to my advantage to have him understand that I am not interested in your business at all."

If the plaintiff knew of the relation between Burwell and Ball, there was no object in withholding the knowledge from the public. There could be no motive in maintaining the secrecy of their arrangement except in their dealings with the plaintiff. If then, as they maintain, the plaintiff had knowledge, why were the facts so cautiously kept from others?

The correspondence is conclusive of the purpose for which the Ball Company was formed and the object of the defendants in keeping Burwell's interest secret. The purpose was to secure the outside work of the plaintiff and the object of secrecy was to enable Burwell to provide that work un-

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hampered by any apparent interest. The fact that Ball agreed to assume the management and operation of the plant is strongly suggestive of an agreement on Burwell's part to provide the plant with work from the plaintiff's factory.

Furthermore, if, as alleged, Lozier knew of Burwell's partnership relations, it is significant that he never communicated the fact to either of his sons who were interested with him in the plaintiff corporation, or to any person connected therewith and that, after Lozier's death, which occurred in May, 1903, neither Burwell nor Ball disclosed their business relations to any one connected with the plaintiff.

But the defendants insist that, even if the plaintiff had no knowledge of the partnership, nevertheless it cannot maintain this action. They assert that Burwell retired from the Ball Manufacturing Company in September, 1904, at which time the amount of his investment was returned to him and that he retained merely a one-half interest in the machinery; that at that time Burwell's participation in the profits ceased and that thereafter Ball was the sole owner of the business of the Ball Manufacturing Company; and that, upon the sale of the plant, Ball paid Burwell $11,000 as his share of the consideration realized and, further, that Burwell has no claim upon the notes. There is a significant silence respecting the manner in which the payment was made; no written evidence of the payment is presented; there is no indication that such evidence exists; and no reason is suggested why Burwell should have received $11,000 out of the $15,000 realized for the plant when admittedly he had but a half ownership.

I am satisfied that the copartnership was continuous and in existence when the plant was sold in 1906. There was no dissolution agreement; no advertised notice; no action taken by Burwell to protect himself from future debts of the firm; none of the steps usually adopted by a retiring partner were followed; in fact, there is nothing indicating a dissolution beyond the statements of the defendants that Burwell "withdrew;" that his investment was returned; and that he retained only a half interest in the machinery. Such state-

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ments are refuted, however, by the relations which continued after Burwell's alleged withdrawal. In the subsequent correspondence between the defendants, the business of the Ball Manufacturing Company was referred to as "our business;" nothing was done by Ball, even with respect to the minor details of the business, without first consulting Burwell; letters from the plaintiff to the Ball Manufacturing Company were referred by Ball to Burwell for reply; the report of a mercantile agency, dated November 17, 1905, contains the statement: "Charles P. Ball has always been disinclined to say who was interested with him in the business;" in a memorandum of agreement, dated January 1, 1905, witnessed but unexecuted, we find the following prefatory statement: "Whereas Charles P. Ball, hereinafter known as party of the first part, and G. A. Burwell, hereinafter known as party of the second part, are equal and sole owners of the property and business now being carried on at Stamford, Ct. and known as the Ball Manufacturing Company, are desirous of continuing as equal partners;" and finally in a letter to one H. C. Williamson in April, 1906, relating to a contemplated change of site, Ball writes:

"Within a few days I have seen my partner in regard to the property, which you have at Norwich and he thinks it is too far from New York for our business and from what he says I am inclined to agree with him."

These facts are incompatible with a dissolution in 1904.

All the facts and circumstances disclosed upon this motion support the right of the plaintiff to maintain the action and point to probable success.

Any profits received by Burwell from the Ball Manufacturing Company were acquired by virtue of his position either as agent or director of the plaintiff and whatever he secured in that manner belongs to the plaintiff. An agent will not be permitted to make a profit out of the authority conferred upon him by, and withhold the advantage from, his principal. Sheridan v. Sheridan Electric Light Co., 38 Hun, 396; Dutton v. Willner, 52 N. Y. 312; Wardell v. Railroad Co., 103 U. S. 651. The relation between a director and the corporation he represents is that of trustee and *cestui*

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que trust. Butts v. Wood, 37 N. Y. 317; Bliss v. Matteson, 45 id. 22; Brinckerhoff v. Bostwick, 88 id. 52. Like every other trustee or agent he cannot, in acting on behalf of the corporation, secure or reserve to himself any advantage or benefit. Koster v. Pain, 41 App. Div. 443. The law will not tolerate any act which tends to bias the conduct of an agent in his duty to his principal, and every advantage secured or profit gained by the former belongs not to him, but to his principal. And where an agent or a director has from his dealing with the property or affairs of the corporation received profits not common to the stockholders of the corporation, he must account therefor.

Applying these principles to the facts as analyzed on this motion, and in view of the failure of the defendants to controvert allegations of irresponsibility, the plaintiff is entitled to equitable protection in the form of an injunction which affords the only complete safeguard against the possibility of an ineffectual decree.

The motion for a continuance of the injunction *pendente lite* will be granted upon the plaintiff's filing a bond in the sum of $40,000 to secure the payment of the notes held by the defendant Ball, with interest, in the event of the plaintiff's nonsuccess, or of such part of the amount thereof as may be determined to be due to the defendant Ball upon an accounting.

Ordered accordingly.

EDWIN MILTON ROYLE, Plaintiff, *v.* CHARLES B. DILLINGHAM, Defendant.

(Supreme Court, New York Special Term, March, 1907.)

Injunction — Who and what may be enjoined — Breach of contract — Contracts for use of copyright, etc. — Unauthorized changes in text.

One who undertakes to produce a play written by another, under an agreement providing that no changes or alterations in the play or additions thereto shall be made without the consent of the author, will be restrained by injunction from making unauthorized changes and modifications in the text and structural arrangement thereof.

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MOTION to continue an injunction.

Wilder, Ewen & Patterson, for plaintiff.

Hoadly, Lauterbach & Johnson, for defendant.

LEVENTRITT, J. In view of the conclusions I have reached, it becomes expedient to render a decision forthwith so that the parties may, if possible, compound their differences. The papers have been so recently submitted and are so voluminous that I can do little more than state my conclusions both on the facts and the law.

The plaintiff protests against the production of his play, written pursuant to contract for the defendant, on the ground of unauthorized changes and modifications in the text and structural arrangement thereof. The defendant apparently concedes that the changes are of a substantial character, but justifies his purposed production on the ground of waiver and consent. I have carefully read the lengthy file of letters that passed between the parties, as well as the various affidavits, and I fail to find the claimed waiver or consent. The defendant's averments are general and without sufficient particularity as to time and place to support the oral waiver. There is nothing in the correspondence, as I read it, that establishes either the proof or presumption of consent. There is a frankness and a spontaneity in the plaintiff's letters which, while showing a commendable willingness to adjust himself so far as possible to the demands of the principal actress in the proposed production, are clear in their explicit refusal to permit changes beyond a certain point. It seems that, in the beginning, the defendant sided with the plaintiff and recognized his right of censorship over all changes. Whether or not the radical changes are the result of caprice or vanity, or are a benefit to the play, is not open for discussion. The defendant, by his letter of December nineteenth, explicitly states that he has accepted the plaintiff's play. All subsequent changes are dependent on the will of the plaintiff, whether its exercise be arbitrary or otherwise.

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Probably under the common law and certainly under his contract the plaintiff is within his rights in invoking equitable jurisdiction. Whether we have gone quite as far as other countries whose literary history is longer in the protection of literary property may be open to doubt; but there is, as there should be, a growing tendency to bestow on authors that full measure of protection which their unique property requires. Whether the work is great or trivial, original or adapted, the principle should be the same so long as the work is the author's own. The court will not apply canons of literary taste but leave that to the public. The tendency of our authorities is shown by such cases as Drummond v. Altemus, 60 Fed. Rep. 378; Clemens v. Belford, 14 id. 728; Harte v. De Witt, 1 Cent. Law J. 360.

Under the contract made between the parties the plaintiff has not parted with his property but has in effect merely given a license to produce it He has retained the right to supervise the selection of actors and the general production. He has fortified himself against the specific invasion of his rights by an unequivocal clause in the contract which reads: "XIII. It is further mutually understood and agreed that no changes or alterations in the said play, or any additions thereto, shall be made without the consent of the party of the first part." Whatever the plaintiff's common-law rights, this clause protects him. I find no consent to the proposed changes has been given and that the plaintiff, not having been guilty of laches, and being without adequate remedy at law in the protection of his name and reputation as an author, is entitled to a continuance of the injunction.

Ordered accordingly.

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ALFRED M. RAU, Plaintiff, *v.* WILLIAM J. SEIDENBERG, Defendant.

(Supreme Court, New York Special Term, March, 1907.)

Specific performance — Subject matter of enforceable contracts — Contracts to transfer stock.

Injunction — Preliminary injunction — Grounds and matters considered — Injunction when right depends on extrinsic facts — Acts tending to render judgment ineffectual.

Values — Market value — How established; Evidence of market value.

One who advances money to purchase mines, upon the agreement that a corporation shall be formed and that he shall receive for such advances a proportionate share of the capital stock of the corporation, may maintain an action for the specific performance of the contract when the stock has no known or definite value and his damages are, therefore, incapable of ascertainment.

Market value is a price established by sales of property of the same kind to so great an extent and in so many instances that the value becomes fixed.

In such a case, where the whole capital stock has been issued to the defendant with whom the arrangement with the plaintiff was made and it appears that the defendant is of doubtful responsibility, an injunction will be granted restraining him from disposing of any of the stock during the pendency of the action.

ACTION to compel the specific performance of an agreement.

Hays & Hershfield, for plaintiff.

Wing, Russell & Watterson, for defendant.

LEVENTRITT, J. Prior to December, 1906, the defendant was engaged in promoting an enterprise looking to the acquisition of certain lands in New Mexico said to contain meerschaum deposits. Being in need of funds to finance the undertaking, he, on December 7, 1906, sought out the plaintiff whom he induced to invest the sum of $5,000 upon the understanding that, after purchasing and perfecting title to the lands in question, a corporation would be formed to take

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over the property and mines acquired, for which capital stock would be issued, and that thereupon the plaintiff would receive for the amount invested by him a proportionate share in the resultant holdings of the defendant in the stock of the corporation in the ratio of $5,000 to the cost to the defendant of such holdings. The property was purchased and a corporation formed known as "The Meerschaum Company of America," with a capitalization of $6,000,000, represented by 600,000 shares of stock of the par value of $10 each, of which 82,575 shares were issued to the defendant. The cost to the defendant of his interest in the enterprise did not exceed $40,000. In response to the plaintiff's demand for his proportion of the 82,575 shares, the defendant tendered 1,000 shares claiming, as he now contends, that the plaintiff had agreed to buy that number at $5 a share. Thereupon the plaintiff brought this action in equity for a specific performance of his agreement with the defendant, basing his right to equitable relief upon allegations that the stock of the Meerschaum Company of America has no known or definite value; that his damages would, therefore, be incapable of ascertainment; and that, even if damages could be calculated, the defendant is financially irresponsible. Upon this motion he seeks to enjoin the defendant from disposing of any of his holdings in the Meerschaum Company of America during the pendency of the action.

The plaintiff's version of the agreement is supported and the defendant's version negatived by the fact that, at the time when the agreement was made, the mines had not been secured, no corporation had been formed nor plans to that end perfected and it was not known what the capitalization of the proposed corporation or the par value of its stock would be. Although the defendant alleges that all arrangements were completed by himself and his "associates" prior to December 7, 1906, there is a significant omission to present in support of his statement an affidavit by any other person engaged in the enterprise. The proof preponderates in plaintiff's favor, and upon the facts he should receive equitable protection.

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The first contention urged by the defendant is that this is not a proper case for specific performance, because the defendant is able to respond in damages which are capable of computation.

Courts of equity will not as a general rule entertain jurisdiction to compel specific performance of an agreement to sell stock, but that rule is limited to cases where compensation in damages furnishes a complete and satisfactory remedy. The defendant urges that the stock has a definite market value of five dollars per share and presents affidavits of a number of persons who have stock which they are willing to sell to the plaintiff or to the public at that price. Bouvier defines market value as a price established by public sales in the way of ordinary business, and in Sloan v. Baird, 162 N. Y. 330, the Court of Appeals said: "The market value of property is established when other property of the same kind has been the subject of purchase or sale to so great an extent and in so many instances that the value becomes fixed."

It is conceded that no sales of this stock have been consummated although a few uncertain offers to purchase have been received. The corporation is but recently formed; the enterprise at best is an experiment, the result of which will be unknown until the mines are developed, and it cannot be seriously maintained that the stock could have a definite market value irrespective of the failure to establish such value by any sales. But, even if the market value were fixed, or the offers to sell shares to the plaintiff at a price named could be construed as defining value as to him, I am of the opinion that a judgment in damages could not be enforced against the defendant. To be sure he asserts his financial responsibility but, in response to a direct attack, supported by facts, upon the truth of his assertion, he presents no proof and leaves the plaintiff's charge practically unchallenged.

As to the right of the plaintiff to maintain this action, I am inclined to the views expressed in Treasurer v. Commercial Mining Co., 23 Cal. 390, where the court say: "In peculiar conditions of business and mining operations in

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this State, where numerous mining and other corporations are in existence whose stock is often a fluctuating and uncertain value, * * * where the market value of stocks, if any they have, is often difficult to substantiate by competent evidence, and where the risk of the personal responsibility of individuals and corporations is so great, courts should be liberal in extending the full, adequate and complete relief afforded by a decree of specific performance."

Here no market value is shown but, conceding damages to be ascertainable, they would be adjudged in an action at law against a person whose inability to respond is substantiated. The plaintiff has, therefore, established his right to injunctive relief until the merits are determined.

The injunction could also be sustained upon another ground. Even if this were not a case where the facts and probabilities were so clearly resolved in the plaintiff's favor, the last analysis of the facts presents a situation where, upon balancing considerations of relative convenience and inconvenience, it is apparent, not only that a disposition of the defendant's stock during the pendency of the action is likely to result in irreparable injury to the plaintiff, but that the balance of inconvenience preponderates in his favor, and the injunction should be continued. High Inj., § 13, and cases cited.

The preliminary injunction will be modified, however, so as to cover one-ninth of the stock (82,575 shares) originally issued to the defendant instead of the entire amount of his holdings. The motion will be granted as indicated, with ten dollars costs to the plaintiff to abide event.

Ordered accordingly.

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ALBERT A. ULTECHT et al., Plaintiffs, *v.* WILLIAM ALLEN et al., Composing the Board of Fire Commissioners of the City of Mount Vernon, Defendants.

(Supreme Court, Westchester Special Term, March, 1907.)

Municipal corporations — Fire department — Power of fire commissioners — Disbanding and reinstating companies.

Injunction — Who and what may be enjoined — Enjoining fire commissioners.

The action of the board of fire commissioners of the city of Mount Vernon in disbanding a fire company upon charges preferred by the chief, without notice or hearing, though within the power of the board, is not judicial in its character; and the court will not enjoin the same board, though composed of different members, from later revoking the order disbanding the company and from reinstating it.

ACTION by taxpayers for an injunction.

Joseph F. Wood, for plaintiffs.

David Swits, for defendants.

TOMPKINS, J. This action is brought by taxpayers to restrain the present board of fire commissioners of the city of Mount Vernon from entertaining a petition by the members of Washington Engine Company No. 1 of Mount Vernon, asking the said board to revoke an order made by a former board of fire commissioners of said city, in November, 1906, disbanding the said fire company, and to restrain the present board from giving a hearing upon the said petition and any charges that may have been the basis of the said order disbanding said company, and to restrain said board from reinstating the said Washington Engine Company No. 1 as a member of the Mount Vernon fire department.

The action is brought and an injunction *pendente lite* is now asked for upon the theory that the action of the former board of fire commissioners was judicial in its character, and not subject to review by the present board.

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It appears from the papers before me on this motion that, on November 9, 1906, the board of fire commissioners received from the chief of the city fire department a communication in writing making certain charges against Washington Engine Company, and recommending that the company be disbanded. This the board of fire commissioners did, by resolutions adopted at the same meeting, without any notice being given to the company or any officer thereof, and without any hearing or investigation into the facts, other than such as was possible from the statements contained in the said communication from the chief. In short, the action of the board of fire commissioners was summarily taken, without notice to the company and without an opportunity for a hearing. Such action the board of fire commissioners undoubtedly had a right to take under section 213 of the city charter; but such action cannot be called judicial in its character so as to prevent a subsequent rescission of the resolution, and this disbandment. If the action of the board was a judicial determination of the right of the company to continue as a member of the fire department, then, without doubt, the present board could not rescind or reverse that determination; but to give judicial character to the act of a board or tribunal, the parties, interested in the subject-matter and to be bound by the act or decision, must be before the tribunal in some form, or must have submitted some claim for adjudication, or been cited to answer some charge. Here there was nothing but the arbitrary act of the board, with nothing before it but the written communication of the department chief, as I have already said. The board had a right to take such summary action, but there is no law to my knowledge, nor has my attention been called to any, to prevent the same board, whether composed of the same members or not, from reviewing the former action and, in a proper case, to vacate the resolution of disbandment, and reinstate the company.

The case of People ex rel. Healey v. Fire Commissioners, 27 App. Div. 530, cited by plaintiffs' counsel, is not an authority for the relief asked in this action.

In that case, the court held that the board of fire com-

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missioners of the city of Auburn had power to disband a company without charges or a hearing, and that the court had no power by writ of certiorari to review or reverse such action — it is not held or intimated that the board itself could not have rescinded its former action.

The personnel of the board of fire commissioners of Mount Vernon is not important. It is a continuing body and legislative in its character and functions. It is given the right to organize and create new companies, as well as to disband old ones; and it is a matter of legislative discretion whether the board adds an entirely new company to the department or gives life to an old one.

Motion for an injunction *pendente lite* denied; ten dollars costs to the defendants.

Motion denied, ten dollars costs.

THE SOUTH SHORE TRACTION COMPANY, Plaintiff, *v.* THE TOWN OF BROOKHAVEN et al., Defendants (2 cases).

THE SOUTH SHORE TRACTION COMPANY, Plaintiff, *v.* THE VILLAGE OF PATCHOGUE et al., Defendants (2 cases).

(Supreme Court, Nassau Special Term, March, 1907.)

Street railways — Street railway companies, their franchises and right to use of streets — Franchise and right to use streets — Conditions imposed by municipality — Performance of condition — Effect of non-performance.

Pleading — Supplemental pleadings — Supplemental complaint — New cause of action where none previously existed.

Injunction — Preliminary injunction — Grounds and matters considered. Grounds for refusing — Failure of complaint to state cause of action — Non-performance of conditions by plaintiff.

A street railway company, to which a franchise from a municipality to lay its road in certain public streets was granted upon condition that the company should file a bond, to be approved by certain municipal officers, indemnifying the municipality against claims for damages during the construction of the road and should also complete its road within a certain time, having failed to complete its road within the given period or to file the required bond, and having, after the expiration of such period and without filing such bond, brought an action to restrain the municipality

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from granting a franchise to another company to lay a railway in the same streets, and having procured a temporary injunction in such action conditioned upon its giving a bond, as required by its franchise, and having thereafter filed a bond with the required conditions, may not, after the order for the temporary injunction has been reversed on appeal for the failure of the plaintiff to comply with the conditions of its franchise before the order was granted, be permitted to file a supplemental complaint showing its subsequent compliance with such conditions

A plaintiff may not, by supplemental complaint, establish a cause of action where none existed at the time the suit was brought.

Nor can a new injunction be granted after the filing of the bond since the supplemental complaint cannot be filed and the original complaint fails to show a cause of action.

Nor will an injunction be granted in another similar case where the complaint shows the filing of a bond but fails to show that the bond was approved as required by the condition of its franchise.

Moreover, the condition of the franchise must be construed to require the filing of the prescribed bond within a reasonable time; and the filing of a bond after more than three years had elapsed and the period within which the road was to be completed had expired was too late to satisfy the condition.

And the failure of the plaintiff to construct its road within the required time, though it may not work a forfeiture of its franchise, furnishes a sufficient reason for denying it equitable relief.

MOTIONS are made by the plaintiff in the above four actions to continue temporary injunctions, and in two of them plaintiff also moves for leave to serve supplemental complaints. The actions are brought to enjoin the local authorities of the town of Brookhaven and the village of Patchogue respectively from granting to defendant railway companies, and said defendant companies from accepting, consents or franchises to construct and operate a railway over certain streets, on the ground that the right to construct a railway on said streets had previously been granted to the plaintiff by the municipal authorities. In two of the actions the Suffolk Traction Company is impleaded with said town and village respectively as a party defendant, and in two of them the Cross Island Traction Company is impleaded as a party defendant. The further facts are fully stated in the opinion.

Arthur Carter Hume, for plaintiff.

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Joseph T. Losee, for the village of Patchogue.

Lexow, Mackellar & Wells, (Clarence Lexow, of counsel), for Cross Island Traction Company.

Collin, Wells & Hughes (Arthur A. Collin, of counsel), for Suffolk Traction Company.

T. M. Griffing, for town of Brookhaven.

SCUDDER, J. On April 1, 1903, the South Shore Traction Company, the plaintiff, obtained consents or franchises from the village of Patchogue and the town of Brookhaven respectively to build a street railway on certain highways. These consents were substantially the same in terms. The consent of the highway commissioners of the town of Brookhaven contained the following provisions:

"2. This franchise and consent not to be operative until the Traction Company shall give or cause to be given a bond of sufficient sureties to be approved by said highway commissioners in the penal sum of seven thousand five hundred dollars ($7,500) to indemnify and save harmless the said town of Brookhaven, and the highway commissioners thereof, from any, and all, damages, costs, actions, claims and demands arising from the construction, maintenance and operation of said railroad up to a period of thirty days after completion of said railway, and for the faithful execution and performance of the terms and conditions upon which this franchise is granted and the provisions of law applicable thereto, and upon the faithful performance of all the provisions and conditions herein contained, then this obligation to be void, otherwise to remain in full force and effect.

"3. Such railroad shall be completed and in operation, * * * within two years from the date of the granting of this franchise. Otherwise all rights and privileges under this franchise and consent shall cease and determine."

The wording of these provisions in the consent of the village of Patchogue is precisely the same except that in section 2 the words "trustees" and "the village of Pat-

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chogue" are inserted in place of the words "highway commissioners" and "the town of Brookhaven."

Under these provisions of the franchise the time within which plaintiff was required to build its road expired April 1, 1905. The time provided in the town franchise was, however, subsequently extended by a resolution of the highway commissioners to October 25, 1906.

In July, 1906, the plaintiff commenced its actions against the village of Patchogue and the town of Brookhaven respectively in which actions the Suffolk Traction Company was impleaded as a defendant.

On August 30, 1906, the plaintiff obtained an order continuing, during the pendency of each action, an injunction restraining the respective municipal authorities from granting their consent to the construction, maintenance and operation of a street railway by the defendant, the Suffolk Traction Company. Each of these orders contained a condition that, if the plaintiff should fail within twenty days from the entry of the order to file with the clerk of the village in the one case and with the clerk of the town in the other a bond in the penal sum of $7,500 such as was required by the terms of the franchise to plaintiff, the order should be void; but, if the plaintiff should tender to the board of trustees of the village and to the board of highway commissioners, respectively, such a bond, and the respective boards should refuse to approve the same, the injunction order should not be deemed vacated unless an order to that effect should be thereafter entered. An appeal having been taken from each of these orders, both orders were reversed by the Appellate Division. In the opinion of the appellate court rendered upon said reversal (South Shore Traction Company v. Town of Brookhaven, not yet reported) it is stated that the court "reached the conclusion that the consent to the plaintiff never became operative because of the failure of the plaintiff to give the bond as provided in that portion of the consent quoted *supra* (section 2 of the consent)."

On September 19, 1906, the plaintiff filed bonds in the sum of $7,500 with the respective municipalities in compliance, inferentially at least, with the injunction orders above

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referred to which were afterward reversed on appeal. On the motions now under consideration the plaintiff claims that such filing of the bonds was a compliance with section 2 of the franchise and seeks to set up the fact of such filing by supplemental complaint in the two actions in which the Suffolk County Traction Company is a defendant. The question whether leave should be granted plaintiff to serve such supplemental complaints will first be considered.

On the appeal from the injunction order previously granted in these actions, it was held that, at the time of their commencement, the consents to the plaintiff had not become operative because of the failure of the plaintiff to give the required bond, and that, therefore, at that time, the village trustees and the highway commissioners respectively had a perfect right to grant a consent to another corporation with which the court could not interfere by injunction. South Shore Traction Company v. Town of Brookhaven, *supra*. The plaintiff, in order to supply the deficiency in the facts upon which its right of action for an injunction depended, has attempted to file the required bond after the commencement of the actions, and now asks leave of the court to be allowed to plead such subsequent filing of the bond for the purpose of showing that, at the time of the commencement of the action, it had a cause of action. A plaintiff has no right by supplemental complaint to establish a cause of action when none existed at the time when suit was brought. Farmers' Loan & Trust Co. v. United Lines Telegraph Co., 47 Hun, 315; Holly v. Graf, 29 id. 443; Banigan v. Nyack Village, 25 App. Div. 150; Smith v. Bach, 82 id. 608. It follows that leave to plead the subsequent filing of the bond by supplemental complaint cannot be granted.

The continuation of the injunctions in these actions must also be refused. The right to the injunctions depends on the nature of the actions and must be granted, if at all, under section 603 of the Code of Civil Procedure. The injunctions which were granted on the facts presented by the original complaints have been reversed. A second application for an injunction on the original complaint is not

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allowable. There is no supplemental complaint before the court and leave to serve the proposed supplemental complaint, as we have already seen, cannot be granted. There is consequently no complaint before the court upon which the injunctions sought can be granted. A motion for a temporary injunction can be based only upon a complaint and cannot be granted upon affidavits. Huntington v. Cortland Home Telephone Co., 62 App. Div. 517; Woodburn v. Hyatt, 34 id. 246; Sanders v. Ader, 26 id. 176; Hudson Valley R. Co. v. O'Connor, 95 id. 6.

The two actions in which the Cross Island Traction Company is impleaded as a defendant were commenced subsequently to the filing of the bond above referred to. In reference to the filing of these bonds, the complaints in these actions allege "that on September 19, 1906, the plaintiff filed with the board of trustees of the village of Patchogue the bond as required by section 2 of the franchise and consent, dated April 1, 1903, of the board of trustees of the village of Patchogue" and "that on the 19th day of September, 1906, the plaintiff filed with the board of highway commissioners of the town of Brookhaven, the bond as required by section 2 of the franchise and consent, dated April 1, 1903, of the board of highway commissioners of the town of Brookhaven." Copies of the bonds are attached to the complaint as exhibits, also copies of the consents of the village and of the highway commissioners.

Unless it appears from the allegations of the complaints that the bonds were given as required by section 2 of the respective consents, the plaintiff is not entitled to a continuation of the injunctions in these actions. The consents require the plaintiff to give a bond "to be approved by said trustees" in the one case, and "to be approved by said highway commissioners" in the other. The complaints do not allege that the bonds filed by plaintiff were approved as required by the consents. It also appears from the complaints that the bonds were not filed until September 19, 1906. No specific time for giving the bonds being mentioned in section 2 of the consents, it is to be presumed that the parties to the contract contemplated that they should be

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filed within a reasonable time after the date of the consents, April 1, 1903. In any event, the consents must, by necessary implication, be construed as requiring the bonds to be given before the expiration of the two years within which by the terms of the consents the road was to be built, since the bonds were to be security for the performance by plaintiff of all the terms and conditions of the consents, the principal one of which was the completion and operation of the road within two years. Since it does not appear from the complaints in these actions that plaintiff has given a bond as required by section 2 of the consents, the injunctions therein cannot be continued. See authorities last above cited.

The injunctions sought should be refused moreover upon the merits as well as upon the principles governing injunctions *pendente lite*. The consents of the local authorities are in the nature of franchises or contracts. These consents do not expressly provide that the defendant municipalities shall not grant the right of operating a street railway upon the designated highways to any other corporation than the plaintiff, but plaintiff contends that they must be deemed to contain such negative provision by necessary implication. It is not necessary to determine the correctness of this contention in order to determine plaintiff's right to injunctive relief. The plaintiff is asking the aid of a court of equity to compel the defendant municipalities by means of an injunction to specifically perform the assumed negative provision in the consents. To entitle the plaintiff to a specific performance, or to an injunction which will have the same effect, equity requires that it shall show fulfillment of the agreements on its part. Plaintiff does not show that it has constructed its road within the time prescribed by section 3 of the respective consents, but on the contrary it appears that the plaintiff has not yet constructed any portion of its road. Whether or not the failure of plaintiff to construct its road within the time prescribed by the consents, as a matter of law, effects a forfeiture of its franchise, the nonperformance by plaintiff of the agreement on its part furnishes a sufficient reason for denying it equitable relief.

Motion denied, with costs.

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HECTOR M. HITCHINGS, Plaintiff, *v.* JAMES A. SIMMONS, Defendant.

(Supreme Court, New York Special Term, March, 1907.)

Bankruptcy — Discharge of bankrupt — Debts affected — Debts improperly scheduled.

Upon defendant's motion to open his default in an action in which his defense was his discharge in bankruptcy, where it appears he had stated in his schedules that plaintiff's address was unknown and he does not show in his moving papers that the omission to state plaintiff's address was due to his inability to discover plaintiff's whereabouts after reasonably diligent and honest effort on his part, the motion should be denied.

MOTION to open a default.

L. W. Thompson, for plaintiff.

A. L. Cohn, for defendant.

GREENBAUM, J. The opening of a default appeals to the discretion of the court and should not be exercised where it may work inequity. It is not denied that plaintiff's address was scheduled "unknown" in the bankruptcy proceedings, and no affidavit is presented by defendant as to his lack of knowledge or of reasonable opportunity to become apprised of plaintiff's address. There is no doubt that plaintiff's address could readily have been ascertained, and a failure to explain why the address was not mentioned in the schedules or why plaintiff was not given notice of the bankruptcy proceedings is very significant. Defendant, too, makes no denial of plaintiff's charge that he concealed assets in bankruptcy. Unless defendant could establish that his failure to give the address of plaintiff or to apprise him by notice of the bankruptcy proceedings was due to his inability to discover his whereabouts, after reasonably diligent and honest effort on his part, his defense would not avail him. Feldmark v. Weinstein, 45 Misc. Rep. 329; Graber v. Gault, 103 App. Div. 514. Under the circumstances here presented the motion will be denied.

Motion denied.

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MATTER OF SIMON H. COHEN.

(Supreme Court, New York Special Term, March, 1907.)

Depositions — Perpetuating testimony — Application — Sufficiency of affidavit.

Where the affidavit, upon which an order to take the deposition of expected adverse parties was obtained, omits to state the street and number of the office or place of business of the expected adverse parties and that they are of full age and does not state that it is desired to perpetuate the testimony of the witnesses, nor show a necessity for perpetuating it, nor show that a cause of action exists in favor of the applicants, the order must be vacated.

MOTION to vacate an order to take the depositions of expected adverse parties where no action is pending.

Hays & Herschfield, for motion.

S. F. Hyman, opposed.

GREENBAUM, J. The affidavit upon which the order in this case was obtained seems to me to be fatally defective in several particulars. Matter of Ellett v. Young, 95 App. Div. 417, sufficiently indicates the difference recognized in the provisions of the Code between a case where an action is pending and one where no action is pending. In the latter case a compliance with the provisions of subdivision 6, section 871 of the Code of Civil Procedure is a prerequisite. The affidavit of the applicants omits to state the street and street number of the office or place of business of the expected adverse parties, and that they are of full age. In the Ellett case, *supra,* pp. 420, 421, it is made clear that in an action which has not yet been commenced a witness cannot be examined for the purpose of enabling a party to frame a complaint, and that in such case the right to an examination is limited to a situation where circumstances are set forth showing that "it is necessary for the applicant's rights that the witness' testimony should be perpetuated." In the applicants' affidavit the purpose for the examination is disclosed

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to be the ascertainment of the extent to which the expected parties defendant participated in the alleged conspiracy. This is far from stating that it is desired to perpetuate the testimony of these witnesses, and as no facts or circumstances are stated showing a necessity for the perpetuation of the testimony sought no warrant for the order exists. In addition to the foregoing criticisms it seems to me that the papers fail to show what is an essential ingredient, to wit, that any cause of action exists in favor of the applicants. There are no facts alleged from which it may be inferred that the expected defendants did any of the acts complained of. The allegations at best are mere conclusions of fact of the affiant. There is lacking the essential element that the acts complained of were without justification or done maliciously or wantonly. The recent liberal interpretations relating to depositions before trial (Goldmark v. United States Electro-Galvanizing Co., 111 App. Div. 526; McKeand v. Locke, 115 id. 174; Hill v. McKane, 101 N. Y. Supp. 411) are not to be construed as designed to nullify the express provisions of the Code. The order must be vacated.

GEORGE L. McALPIN, Plaintiff, *v.* HUGH R. GARDEN, Defendant.

(Supreme Court, New York Trial Term, March, 1907.)

Damages — Particular contracts and relations — Contracts relating to transfer or exchange of property — Agreement to take or deliver corporate stock.

Values — Market value — Evidence of value of corporate stock.

In an action for damages for failure to deliver a $5,000 share in a shooting club, where the election of the purchaser to membership in the club is a prerequisite to his enjoyment of its privileges or to any rights as a shareholder, the plaintiff is entitled to nominal damages only; and a verdict for $3,000 will be set aside, though it appears that a share has been sold for $5,000 and the club has lands for which it paid $100,000.

MOTION to set aside a verdict.

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W. F. S. Hart, for plaintiff.

Battle & Marshall, for defendant.

DAYTON, J. Action to recover $4,000 damages for defendant's failure to deliver to plaintiff one full $5,000 share of the Santee Club upon the written contract, dated November 10, 1898, of the former so to do. The jury found for the plaintiff in the sum of $3,000 and interest. Defendant moves to set aside the verdict and for a new trial. The Santee Club was a proprietary corporation for the use of its members as a shooting club. At the time of its incorporation the club owned no property, but it was intended by its promoters (of whom the plaintiff was one) to acquire certain lands in South Carolina. There was a change made in the par value and character of the shares, and on January 11, 1899, plaintiff received a certificate for one $1,500 proprietary share from the defendant "to be credited on our account." In February, March and May, 1901, the club received transfers of lands in South Carolina. In March, 1903, defendant wrote to plaintiff that on a reorganized plan of shares, a certain payment should be made to entitle him to the privileges of membership. On November 5, 1903, plaintiff delivered to the defendant a memorandum which included said $1,500 share, dues, etc., showing a balance in plaintiff's favor of $100, and on January 25, 1905, defendant gave to plaintiff a memorandum "on settlement," showing plaintiff's surrender of two $1,500 membership shares (including the aforesaid $1,500 share), and the delivery in lieu thereof of one membership share of $2,500, and crediting him with the above-mentioned $100 on the books of the club. While this memorandum is signed by the defendant, as president of the Santee Club, it is undisputed that the only agreement between these parties was that of November 10, 1898, and, therefore, said memorandum related only to that agreement. Plaintiff was a member of the club and participated in its privileges, and knew of its proceedings and financial operations. It appeared that one of the shares had been sold for $5,000 to a purchaser who was elected a member,

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and there was some evidence tending to show that the club had taken the land above mentioned at a consideration of about $100,000. Could a share in such a club as this have value as a security or property to be bought and sold in the market? The purchaser of such a share would not necessarily be entitled to membership. His election to the club would be a prerequisite to his enjoyment of its privileges or to any rights as a shareholder. It would seem that in any event plaintiff would be entitled only to nominal damages, but I regard the verdict as against the weight of evidence and as excessive on the whole case. Motion granted, verdict set aside and new trial granted, without costs. Cohen v. Krulewitch, 77 App. Div. 126.

Motion granted, without costs.

ERNST BAMBERG, Plaintiff, *v.* THE INTERNATIONAL RAILWAY COMPANY, LOUIS H. SUTTON and EDWIN C. SUTTON, Defendants.

(Supreme Court, Erie Special Term, March, 1907.)

Master and servant — Liability for injuries to third persons — Liability of master for acts of assistant employed by servant.

Carriers — Carriage of passengers — Liability for personal injuries to passengers — Operation and management of vehicles of transportation — Care required to avoid collision with other vehicles.

Instructions — Power of court and necessity — Duty of judge to charge — As to consideration of evidence of parties separately defending.

Where a passenger on a street railway car is injured by a collision with a wagon and it appears that the driver had given the reins to a strange boy and had left his seat and the boy was not able, through want of skill, to control the team but ran the pole of the wagon into the car, causing the injury, the owners of the team in whose business it was engaged are liable for the damages and are not excused by reason of their having instructed the driver not to permit strange boys to ride with him.

And where it also appears that the car did not lessen its speed when crossing the street but proceeded at a dangerous rate beyond the control of the motorman, who was instructing another man then with him and was not properly attentive to his duties while

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crossing an intersecting street, the question of the negligence of the company was properly submitted to the jury.

But where the testimony in behalf of each defendant was given separately, the counsel for each sitting by and not examining or cross-examining the others' witnesses, and the railroad company thereafter requested the court to charge that, in determining the company's liability, the jury should not consider the testimony given on behalf of the owners of the wagon, it was error for the court to refuse so to charge; and a motion by the company for a new trial should be granted.

MOTION on part of defendants for a new trial on the minutes.

Hamilton Ward, for plaintiff.

Charles B. Sears, for defendant railway company.

J. Henry Metalf, for defendants Sutton.

WHEELER, J. This action was brought to recover damages for injuries received by the plaintiff while riding on the defendant railway company's car, which collided with a wagon owned by the defendants Sutton. The jury rendered a general verdict against all defendants, and the counsel for each defendant moves for a new trial on behalf of their respective clients.

The accident happened at the crossing of Michigan and Clinton streets in the city of Buffalo. The railway company operates a street car line on Michigan street, and has double tracks in the street at this point. On the morning of the accident the plaintiff took a car going south on Michigan street. It was what is known as an open car, having seats running across the car, and was provided with a running board along its side. As the seats were filled, the plaintiff was standing on the running board. As the car approached Clinton street, which crosses Michigan street at right angles, a wagon belonging to the Suttons was approaching the tracks from the west. The motorman operating the car proceeded to cross Clinton street, while the wagon drawn by a span of mules continued to move toward the tracks on a trot. The result was that the pole of the wagon struck the car at about

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the third seat from the rear end of the car. It hurled the plaintiff to the ground, and he received serious personal injuries, which will disable him for the remainder of his life.

The evidence of negligence on the part of the driver of the wagon was most conclusive. The defendants Sutton were the proprietors of an ice cream business, and the wagon in question was employed by them in the distribution of ice cream; and was one of many wagons operated by that firm. On the morning of the accident this wagon drawn by a span of mules left the stables of the defendants Sutton in charge of a driver by the name of Harvey. There is no claim but that Harvey himself was an experienced and competent driver, but as he left the stables he took onto the driver's seat with him a boy, whose name he does not appear to have even known, and whose ability to drive or handle horses was wholly unknown to the driver. The subsequent events demonstrate very conclusively that this lad must have had no experience whatever as a driver. Shortly before this wagon reached Michigan street, where the accident happened, Harvey, the driver, got off the seat and climbed back into the rear of the wagon to do something to the ice cream cans with which it was loaded and, in so doing, handed the reins to the boy on the seat, although he claims they were still within his reach as he worked at the cans. The wagon continued to approach Michigan street; and the motorman, supposing the wagon would stop, continued his way across Clinton street.

The most reliable evidence tends to show that the wagon did not slacken its speed, but continued to come right on toward the car on a trot. The boy holding the reins pulled up on the reins, carrying his hands over his head; but, owing to the lack of any proper hold on the reins, he did not apply any pull to the reins so as to arrest the speed of the mules, and the result was that the pole of the wagon crashed into the side of the car as stated. Harvey, the driver, testified that he supposed the car would stop and gave no more attention to the matter until the boy on the seat called out that the car was not going to stop. He then grabbed the lines and made a desperate effort to stop the team, but was too late to avoid the collision.

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I do not understand there is any serious claim on the part of the defendants Sutton that the team was properly handled. The contention, however, is made that Harvey, the driver, had received explicit instructions from the defendants not to permit strange boys to ride with him, or to drive the team, and that in this Harvey disobeyed these directions, and that the defendants Sutton ought not to be held liable for the negligent acts of the boy driver who, it is claimed, was not their servant.

The counsel for the defendants Sutton cites and relies upon the case of Long v. Richmond, 68 App. Div. 472, affd. in 175 N. Y. 495, without opinion.

The facts in this case, however, distinguish it from the case of Long v. Richmond.

In the case above cited, the plaintiff was injured by a friend or companion of the defendant's coachman while riding a polo pony. The defendant owned two polo ponies, one a chestnut and the other a gray, and had instructed his assistant coachman not to let anybody ride the gray pony, either to or from the polo grounds, but to ride the chestnut pony and lead the gray. On the day of the accident, a neighbor of the defendant, whom the defendant permitted to use the ponies, directed the assistant coachman to take the ponies to the polo grounds. At the time such direction was given, one Eckert, who was not and never had been in the employ of the defendant, was with the assistant coachman, and the latter permitted Eckert to accompany him to the grounds, the assistant coachman riding the chestnut, and Eckert, in violation of the defendant's instructions and without his knowledge, riding the gray. The ponies were then used on the grounds and, after the game had been concluded, the assistant coachman and Eckert mounted as before. The assistant coachman started for home with the chestnut pony, but Eckert rode about the polo grounds with the gray in such manner that it became frightened and ran into the public streets, where it came into collision with the plaintiff's wagon and caused the damages sought to be recovered. It was there held the defendant was not liable under the circumstances.

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It will be noted that in that case Eckert was in no way engaged in the defendant's business at the time of the accident. He took the pony to the polo grounds for the accommodation of the neighbor of the defendant who used it after reaching the ground and, after the game was over, instead of returning home Eckert was riding the pony about the grounds apparently for his own pleasure and amusement. He certainly was doing nothing connected with either the defendant's business or amusement, and the court properly held the owner was not responsible for Eckert's acts under the circumstances.

In this case, however, the lad on the seat was engaged in the prosecution of the business of the ice cream concern. The team and wagon were out, engaged in the delivery of ice cream to the defendants' customers, and these facts clearly distinguish this case from that of Long v. Richmond. The evidence in this case goes even further. It appeared that it had been the custom of the driver to start out his trips with a boy to assist him in driving and distributing ice cream and that, the regular boy being absent on the morning in question, the driver took this strange lad in his place; and, at the very time of the accident, he was assisting in doing the business of the master and aiding Harvey, the driver, in doing the work the other boy was required to do.

It further appeared from Harvey's statement that he, in a way at least, still remained in control and management, not only of the wagon, but also of the team itself; for he testified he left the reins within reach so he could seize them and did seize them, at the last moment, in an effort to stop the team, but too late to avoid the collision. So the accident appears to have been caused in part by the negligent act of Harvey, the driver, in not retaining complete control of the reins, or in not properly watching for and guarding against the approaching car. The accident may be said to be fairly attributable to the negligent acts of Harvey himself, when in immediate control and management of the wagon and team and while engaged in the prosecution of his master's business.

This case appears rather to fall within the rule applied

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in the case of Althorf v. Wolfe, 22 N. Y. 355, where the plaintiff's intestate was killed by being struck by ice and snow thrown from the roof of defendant's house while passing along the street below. The defendant had directed one Fagan, his coachman, to clear off the snow from the roof of his house. Fagan asked one Cashan to help him. They both went upon the roof and both worked on the roof throwing off the snow. Cashan was assisting at his own suggestion, and without authority from the defendant to employ any one. It was contended the defendant was not liable but the court held to the contrary, and said that it was immaterial whether the intestate was killed by ice thrown by Cashan or by Fagan; that, in either view, it was substantially the act of Fagan. The court cites Booth v. Mister, 7 Carr. & Payne, 66, where defendant was held liable for injuries to the plaintiff's cabriolet resulting from the negligent manner in which the defendant's cart was driven, although it appeared that the defendant's servant was not driving at the time, but had entrusted the reins to a stranger who was riding with the servant, and not in the service of the defendant, the liability being placed on the ground that the negligence causing the injury was substantially the act of the defendant's servant, who was in the cart, and the master had put it in the power of the servant to do the injury.

In Cosgrove v. Ogden, 49 N. Y. 255, the defendants were lumber dealers, and the plaintiff, a child, was injured by the falling of a pile of lumber placed in the street by defendants' employee, who had been instructed by the defendants not to pile the lumber there. The defendants were held liable for the accident, as the act was done by the servant in the prosecution of their business, and they were not relieved from responsibility by the servant's departure from their instructions in the manner of doing it. The court said: "The test of the master's responsibility for the act of his servant is not whether such act was done according to instructions of the master to the servant, but whether it is done in the prosecution of the business that the servant was employed by the master to do." See also Kilroy v. D. & H. C. Co., 121 N. Y. 22.

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We, therefore, are clearly of the opinion that the defendants Sutton were liable for the negligence of the driver, Harvey, and of the boy on the seat, and of each of them, and as to the defendants Sutton the motion for a new trial must be denied.

The defendant The International Railway Company also moves for a new trial upon the minutes.

As to this defendant the evidence of negligence is much less satisfactory and not altogether convincing. Nevertheless, there was some evidence given on the trial from which the jury might draw the inference of negligence. It was claimed the street car did not lessen its speed while crossing Clinton street, but moved across that street at such a high rate of speed as to render it dangerous, and to put the car beyond the proper control of the motorman.

There was also evidence that the motorman at the time had with him on the platform another man, whom he was instructing, and that at the time he was engaged in conversation with this person and not properly attentive to his duties while crossing an intersecting street.

The force of this evidence (which was controverted by other testimony) was very largely broken by the undisputed fact that the street car was nearly across Clinton street at the time of the collision, and that the wagon pole struck the car near its rear end, the argument being that, but for the negligence of those in charge of the team, the accident would not have happened.

In Loudoun v. Eighth Ave. R. R. Co., 162 N. Y. 381, reversing the same case in 16 App. Div. 156, it was held in a case of collision at a street crossing between two cars a very high degree of care is required of the carrying road, and that the doctrine of *res ipsa loquitur* applied to the carrying car.

It would seem, therefore, that the question of the negligence of the street railway company was properly one for the jury to determine under all the circumstances of this case.

It is contended, however, that the court erred in refusing to charge the jury that in its disposition of the case, so far

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as the street railway company was concerned, it must disregard the testimony of the witnesses sworn for the defendants Sutton.

The railway company and the defendants Sutton were made joint defendants in this action. Each interposed separate answers, and each appeared on the trial by different counsel. On the trial the plaintiff introduced his evidence tending to charge both defendants with negligence, and then rested. Each defendant then moved for a nonsuit, which the court denied. The counsel for the railway company then took the case and swore witnesses in its behalf and rested, and then renewed its motion for a nonsuit, which was denied. Counsel for the street railway company then stated that the railway company would take no further part in the case, but would stand on the case as then presented by the evidence. The counsel for the defendants Sutton then took the case and gave testimony in their behalf by several witnesses. The counsel for the railway company sat by but did not examine or cross-examine the witnesses sworn by the Suttons. At the close of all the evidence counsel for all the parties summed up the case to the jury, which returned a verdict in favor of the plaintiff against all defendants.

The counsel for the railway company requested the court to charge the jury that in determining the case against the street railway company the jury must not consider the evidence of the defendants Sutton's witnesses, to wit. Harvey, O'Brien and Sutton. The court declined to so charge, and said he thought the jury entitled to consider all the evidence. The witnesses for the defendants Sutton, particularly the driver, Harvey, did give testimony tending to show negligence on the part of the railway, for he testified that he noticed the street car coming and observed that the motorman had his head turned and was talking to the man on the front platform with him. The question is, therefore, squarely presented whether the trial court erred in its refusal to charge as requested.

It would seem that where the subject-matter of a litigation is an accident, in which two sets of defendants are each charged with contributing to it, and the evidence produced

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relates to the subject of inquiry and to the conduct of each, and describes what transpired and was done by each participant on the occasion in question, the jury should be permitted to consider all the testimony in determining the liability of each. And it would also seem that, in a judicial inquiry of this character, each party defendant should be prepared to meet, not only the plaintiff's case, but also any case presented by the codefendant. Of necessity, in such cases, a practical and almost insurmountable difficulty is presented in asking a jury of ordinary intelligence to disassociate the evidence given by one party from that given by the other.

Nevertheless, counsel for the railway company contends a contrary rule has been established by the Court of Appeals in the case of Bopp v. New York El. Vehicle Transp. Co., 177 N. Y. 33, where the court held that, where one of two codefendants upon the trial of an action for negligence moves for a nonsuit at the close of the plaintiff's case and, the motion being denied, excepts thereto, but proceeds to put in evidence and then renews the motion, and upon its denial again excepts and thereafter cross-examines witnesses of its codefendant and continues in the case to the end, attempting to free itself from all responsibility, the exception to the refusal to nonsuit is not available, provided, at the close of the whole case, the evidence presents a question for the jury. While the identical point here raised was not decided in the Bopp case, nevertheless the logical conclusion to be drawn from what the court held and said in its opinion demands the granting of a new trial as to the railway company.

The court said: "It" (*i. e.*, the Vehicle Co.) "did not remain in the case for amusement, but for self-defense, and it could not make further efforts to defend itself without running the usual risks. The plaintiff had the right to rely upon any evidence in her favor, whether it was put in by herself or by either defendant, and the Vehicle Company, by failing to withdraw when it had the right to and continuing to take part in the trial, ran the risk that evidence tending to make it liable would be received.

"The Vehicle Company, by continuing to try its case, for that is what it did, ran the risk that the evidence of its

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codefendant would supply the defects in the plaintiff's case against itself. * * *. The Vehicle Company was not compelled to remain in the case in order to get an exception when its second motion was not granted."

The court, therefore, appear to maintain the proposition, *first,* that a codefendant is not bound to remain in a case until the end, and *second,* that, by withdrawing, the testimony subsequently given by a codefendant cannot be used to supply defects in the evidence against it. There seems to be no logical escape from these deductions.

We, therefore, conclude the trial court erred in not charging as requested that the jury could not consider the testimony of the witnesses for the defendants Sutton in determining the case against the railway company.

An order will, therefore, be entered denying the motion for a new trial as against the defendants Sutton, and setting aside the verdict and granting a new trial as against The International Railway Company.

Ordered accordingly.

GEORGE W. COE, Plaintiff, *v.* MARY PATTERSON and THOMAS C. PATTERSON, as Administrators, etc., of THOMAS G. PATTERSON, Deceased, Defendants.

(Supreme Court, Monroe Trial Term, March, 1907.)

Former adjudication — Who are concluded — Principal and surety. Receivers — Appointment, qualification and tenure of receivers — Operation and effect of appointment — Collateral attack.

Where a receiver was appointed in this State of the property of a corporation organized under the laws of New Jersey, of which a receiver had been previously appointed in the latter State, and gave a bond with sureties conditioned for the faithful discharge of the duties of his trust as such receiver; and where a judgment was thereafter recovered against the receiver in this State and an order was made directing him to pay the judgment, which he failed to do, in an action brought by the owner of the judgment against the sureties upon the receiver's bond, held, that the judgment against the receiver and the order directing him to pay it were evidence against the sureties and concluded them as to their lia-

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bility upon the bond, although the motion for the order directing payment by the receiver was not made in the district where he was appointed nor upon notice to the Attorney General as required by L. 1883, ch. 378.

THIS action was brought to recover against the sureties upon the official bond of Henry D. Leslie, as receiver, the amount of a judgment recovered by Jeremiah Casey against said Leslie, as receiver, in this court, in Monroe county, on June 19, 1901, amounting for damages and costs to $5,375.96. An appeal was taken by Leslie from this judgment to the Appellate Division of this court, which was subsequently dismissed. On July 28, 1902, an order was made by this court, at a Special Term in Monroe county on notice to Leslie, directing Leslie, as receiver, to pay the amount of said judgment to Casey. That order was not complied with by Leslie, although served with a copy and compliance with the order demanded of him. On the 11th day of March, 1905, Casey assigned said judgment, with all his rights thereunder, to plaintiff, and, on April 1, 1905, this court, at Special Term in Monroe county, made an order permitting this action to be brought by Coe against Leslie and the sureties upon his official bond; and, it appearing that Thomas G. Patterson, one of the sureties, had died, the order permitted the action to be brought against the defendants as administrators of his estate.

The cause was tried at the November Trial Term in Monroe county; and, at the conclusion of the testimony, counsel for plaintiff and counsel for the defendants as administrators each moved for a direction of a verdict by the court in favor of their respective clients. A verdict was directed by the court in favor of the plaintiff for $7,118.78, being the amount of the judgment recovered by Casey against Leslie, as receiver, with accrued interest. Counsel for the defendants now moves to set aside the verdict and for a new trial upon all the grounds specified in section 999 of the Code of Civil Procedure.

Pierre M. Brown, for motion.

Eugene Van Voorhis, opposed.

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FOOTE, J. The Casey Machine & Supply Company was incorporated under the laws of the State of New Jersey. It carried on its business, however, in the State of New York, and its factory and all its assets were located in the city of New York. On the 7th of January, 1891, in an action brought in this court by Simon Strauss against that company in the county of New York, an order was made, at Special Term, reciting the previous appointment of Henry D. Leslie, of Richmond county, N. Y., as receiver of all the property and assets of said corporation by the Court of Chancery of the State of New Jersey, and directing that said Leslie be appointed as receiver of all the property and assets of said Casey Machine & Supply Company in the State of New York, with the usual powers and duties of receivers according to the laws of this State and the practice of this court, and directing that said receiver make and file with the clerk of the county of New York a bond to the People of the State of New York in the penal sum of $20,000, conditioned "upon the faithful discharge by said receiver of his duties as such, and upon his duly accounting for all moneys and property of every kind received by him as such receiver." Thereupon said Leslie made and filed his bond, which was duly approved, on January 16, 1891, by a justice of this court, in the penal sum of $20,000, with Valentine Hill and Thomas G. Patterson (defendants' intestate) as sureties. The condition of this bond is "that if the said Henry D. Leslie shall faithfully discharge the duties of his trust as such receiver, then the obligation to be void; otherwise to be in full force and effect."

All the assets of this corporation were located in the State of New York and consisted of machinery, patents, etc. On the 9th of September, 1891, the Court of Chancery in New Jersey made an order directing the receiver to forthwith proceed to sell all the assets of the company, and that such sale take place at the company's factory in the city of New York; and, on or about the twenty-fifth of September, the assets were in form struck down and sold by the receiver to Jeremiah Casey for $29,500 and, in accordance with the conditions of the sale, Casey paid to the receiver ten per cent., or $2,950. This sale was never consummated and the judg-

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ment subsequently recovered by Casey against the receiver is for the amount so paid by Casey to the receiver upon this sale. The receiver claimed that the sale was not consummated on account of Casey's default. This Casey disputes, but it is not material here to determine where the fault lay. The Court of Chancery directed a resale of the property, and a sale was made of the same assets to Thomas G. Patterson, the defendants' intestate, for $11,700. An order was made by the New Jersey Court of Chancery, at about this time, directing that the $2,950 which Casey had paid on his bid should be forfeited, and that the receiver Leslie should sue Casey to recover the difference between the amount of Casey's bid, $29,500, and the amount for which the assets were subsequently sold to Patterson, $11,700; and such an action was brought by Leslie, as receiver, against Casey, in the Supreme Court of New Jersey, and resulted, on the 12th day of April, 1897, in a judgment of nonsuit.

While that action was pending, and on or about the 10th day of December, 1894, Casey brought an action in this court in Monroe county against Leslie, as receiver, to recover the $2,950 which Casey had paid upon his bid at the receiver's sale. The action came to trial at the January Term, 1896, and resulted in a verdict in favor of the plaintiff for the full amount claimed, with interest, amounting in all to $3,687.50. The defendant pleaded as a defense, among other things, the orders which had been made by the Court of Chancery in New Jersey, forfeiting the amount paid by Casey upon his bid. Leslie appealed from the judgment entered upon this verdict to the Appellate Division of this court in the Fourth Department, and on January 13, 1905, an order of that court was made dismissing the appeal.

On the 28th of July, 1902, an order was made by the Special Term of this court in Monroe county, on notice to Leslie, as receiver, by which he was ordered and directed to pay the plaintiff, Casey, within ten days from the date of the order, the sum of $5,375.96, being the amount of the judgment entered in the action of Casey against Leslie, as receiver, on June 19, 1901, for damages and costs, with interest thereon. This order was served upon Leslie, as receiver, and payment demanded; but Leslie neither complied with

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the order by paying the money, nor has he since either appealed from the order, or in any way sought to be relieved from it, or to have it vacated or modified.

Thereupon Casey, having assigned the judgment with all his rights under it to the plaintiff, this action was begun by the plaintiff in April, 1905, an order having been made by this court permitting the plaintiff to sue the sureties upon Leslie's bond for the amount Leslie had been so ordered to pay and had not paid.

Plaintiff proved the judgment against Leslie as receiver and the order directing him to pay it, and rested. Defendants' counsel objected and excepted to the receipt of the judgment or order as evidence against the sureties to establish their liability. Defendants' counsel then presented the same question by motion for nonsuit and by offering to prove the same facts in defense that were proved in defense by Leslie, as receiver, in the action in which the judgment was recovered, and excepted to the rulings against him. These exceptions present the principal question discussed upon this motion, viz., whether the judgment recovered by Casey against Leslie, as receiver, concludes the sureties upon Leslie's official bond. Plaintiff contends that it does, while the position of the defendants is that this judgment is *res inter alios acta* and not even evidence against the sureties except of the fact that such judgment was recovered. I find it impossible to reconcile all that the courts in this State have said upon this subject. It would seem, however, that upon this question this court is concluded by what was decided in the case of Douglass v. Ferris, 138 N. Y. 192. It was there held that the sureties upon a guardian's bond were privies to the judgment recovered against the guardian and that the judgment was conclusive upon the sureties, in the absence of fraud or collusion. While it is true that the condition of the bond in that case was that the guardian should, in addition to faithfully discharging his duties as guardian, "render a just and true account of all moneys and property received by him and of the application thereof to and before any court having cognizance thereof when thereunto required," it is apparent from the opinion that the decision would have been the same had the bond provided simply for the faithful

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performance of his duties as guardian. The guardian in that case had in his hands funds belonging to his ward; and, upon the ward coming of age, the guardian induced him to accept certain obligations and securities of little or no value by means of false representations as to their value, whereupon a settlement of the guardian's account was had in Surrogate's Court and the guardian discharged. Some time after, upon discovering the fraud which had been practiced upon him, the ward brought his action in this court against the guardian and procured a judgment rescinding the settlement and adjudging that the guardian was still indebted to him for the original amount of the fund. This not being paid, the ward sued the sureties upon the guardian's bond. It was held that the judgment recovered against the guardian concluded the sureties upon the official bond. It was said by O'Brien, J.: "The judgment could be impeached for want of jurisdiction or for fraud or collusion, but in all other respects it became conclusive as evidence or by way of estoppel. The plaintiff could not have succeeded in his action against the guardian to annul the settlement and decree, without showing that he had rescinded, any more than he can now succeed against the sureties without establishing the same fact. But the judgment in the former action adjudged that the transaction had been rescinded and this concludes the defendants also."

This question has been more fully considered by Herman in his work on "The Law of Estoppel and Res Judicata" than by any other text-writer. After considering the subject at length, in sections 158, 159 and 160, he concludes the latter section, as follows: "Upon principle, therefore, the rule should be thus formulated: A judgment in an action against the principal alone for acts or omissions which are a breach of the conditions of his bond is, in the absence of fraud and collusion, conclusive evidence in an action brought by the same plaintiff against his sureties upon his official bond, the cause of action being the same."

And in section 161, he says: "It may, therefore, be said that the authorities holding that judgments against a principal are *prima facie* evidence in an action against the

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sureties, it is meant that unless fraud or collusion or a mistake in the facts can be shown, the judgment is conclusive, and this doctrine is applicable in actions upon bonds or recognizances given for the faithful performance of duties of administrators, assignees, constables, sheriffs, trustees, and other parties filling offices of public or private trust."

The functions of receivers are so similar to those of administrators, assignees and trustees that the same principles should control in respect to the liability of the sureties upon their official bonds. It is elementary that a receiver is an officer of the court, and is bound to obey the orders of the court by which he is appointed. Indeed, this is his principal duty. The condition of Leslie's bond as receiver is that he will faithfully discharge his duties as receiver. He was appointed by the Supreme Court, and that court has ordered him to pay the judgment recovered by Casey. That order was made on the 28th day of July, 1902, nearly three years before this action was begun and more than four years before the trial. It has remained in force during all that time; and it does not appear that the receiver has made any effort to be relieved from the order, nor is it suggested that it was procured through any fraud or collusion to which the receiver was a party. Thus, at the time of the trial, the receiver was in the attitude, if not of defying, at least of neglecting, to obey the order of the court whose hand and instrument he is. Nor is it contended on the part of the sureties that all the facts which they proved or sought to prove upon the trial of this action were not presented before this court by the receiver in the action brought by Casey against him. On the contrary, the same facts which the defendants present here as a defense were pleaded by the receiver as a defense in the suit brought by Casey by the same counsel, and they were held to be insufficient in law and fact to defeat Casey's suit. Under these circumstances, can it be said that Leslie has faithfully discharged his duty as receiver? Concededly, he is in the attitude of refusing to obey the order of this court. It was his duty to obey it. His sureties, in legal effect, bound themselves that he should obey it, for in no other way could he faithfully discharge his

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duties as receiver. Can they be heard now to say that there has been no breach of the condition of their bond and no failure on the part of the receiver to faithfully discharge his duties, because, forsooth, the verdict of the jury in Casey's suit was wrong and should have been for the receiver instead of against him, and that the order directing the receiver to pay the judgment was erroneous because based upon an erroneous verdict? Can it be tolerated that the judgment recovered against the receiver shall stand and the order directing the receiver to pay the judgment remain a permanent record of this court, and yet that the sureties upon the receiver's official bond be permitted to have the question submitted to another jury as to whether the receiver has not faithfully discharged his duties as such, upon precisely the same facts submitted to the court and jury by the receiver in his defense of the Casey suit?

The question is not whether the Casey suit was rightly decided, or whether the receiver was rightly ordered to pay the judgment, but whether it became the duty of the receiver to pay that judgment. If such was his duty, then clearly he has failed to discharge it; and, in that view, it is wholly immaterial whether that judgment was right or wrong.

The case would undoubtedly be different if the facts now presented by the sureties in defense of this action were facts not brought to the attention of the court at the time the order was made directing the receiver to pay the judgment, and which, if presented, would have led to a denial of that order, as was the case in Lesster v. Lawyers' Surety Co., 50 App. Div. 181. There the receiver, by complying with one order of the court, had put it out of his power to comply with another order, but this fact was not known to the court at the time the latter order was made.

The $2,950 to recover which the Casey suit was brought was not general assets of the corporation, but arose from a contract made by the receiver with Casey in New York in respect to the sale of assets in New York, the control and custody of which the receiver acquired by virtue of his appointment in New York. Manifestly, the receiver was bound to keep the custody of this fund as a New York re-

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ceiver until he received authority from the courts of New York to transfer it to the New Jersey jurisdiction. Whether this view controlled the decision of Casey's suit against the receiver, we are not advised, but it does appear that, although the New Jersey Court of Chancery ordered Casey's $2,950 forfeited and also authorized the receiver to maintain an action against Casey to recover the difference between his bid of $29,500 and the sum, $11,700, for which the property was subsequently sold and such an action was brought in the Supreme Court of New Jersey, that court necessarily held, in nonsuiting the receiver in that suit, that Casey's contract with the receiver for the purchase of assets of the corporation was not enforceable and that the receiver could not recover. So we have two conflicting decisions in the New Jersey jurisdiction, by the latter of which the $2,950 paid by Casey to the receiver was not forfeited and remained Casey's money; and, I think, the judgment in favor of Casey against the receiver in this State established conclusively that the $2,950 did not become an asset of the corporation, but remained Casey's money.

The point is made that the order directing the receiver to pay this judgment to Casey was not made in compliance with the Haggerty Act, so called (Laws of 1883, chap. 378), in that the motion was made in Monroe county and not in the district where the receiver was appointed, and no notice was given to the Attorney-General. Assuming, without deciding that the order directing the receiver to pay was invalid for failure to comply with this statute, I think it still remained the duty of the receiver to pay the judgment recovered against him by Casey, and he is shown to have failed to discharge that duty.

The point is also made that no recovery can be had against the sureties for the costs which form a part of the judgment recovered by Casey against the receiver. It is sufficient to say that no such point was made at the trial, and there is no exception in the record presenting that question.

The motion for a new trial must be denied.

Motion denied.

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LIZZIE GOEBBLES, Plaintiff, v. JAMES F. MORRISEY, et al., Defendants.

(Supreme Court, Westchester Special Term, March, 1907.)

Partition — Sale and proceedings thereafter — Disposition of proceeds — Deduction of incumbrances.

Where, by the interlocutory judgment in an action of partition, it is decreed that a mortgage upon the premises, more than twenty years past due at the commencement of the action, was valid and that there was due thereon a certain amount beside certain taxes paid by the mortgagee, who was made a party defendant in the partition action, the final judgment should provide that the necessary expenses of the partition sale and the taxes should first be paid and that the balance be paid to the defendant mortgagee on account of his mortgage.

MOTION to confirm a referee's report in partition and for final judgment.

Fred L. Merritt, for plaintiff.

R. McKinley Power, for defendant Morrisey.

Charles H. Banks, for other defendants.

TOMPKINS, J. This is an application for confirmation of the referee's report of sale in partition and for final judgment.

The complaint alleged that the defendant James F. Morrisey was the owner and holder of a mortgage upon the premises described in the complaint for the sum of one hundred and fifty dollars, made on the 19th day of May, 1875, and further alleged that more than twenty years had elapsed since said mortgage became due, and that no action had been brought to foreclose the same, and that the said mortgage was not a lien upon the said premises.

The defendant Morrisey, by answer, admitted that he was the owner and holder of the mortgage, and alleged that the sum of sixty-five dollars had been paid on the 18th day of March, 1887, on account of the interest, and asked that the mortgage be declared a valid lien to the amount of one hun-

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dred and fifty dollars principal, with interest thereon at the rate of six per cent. per annum from the 19th day of May, 1879, less the sixty-five dollars; and for the further sum of ninety dollars and ninety-four cents, paid by the said James F. Morrisey, and for taxes on said premises to protect the said mortgage.

On the trial of the issue as to the validity of the mortgage, the defendant James F. Morrisey succeeded in establishing its validity; and the referee found that there was due on the said mortgage the sum of one hundred and fifty dollars, with interest from the 19th day of May, 1879, less the sum of sixty-five dollars, paid by him on account thereof, and that there was also due on said mortgage the sum of forty-one dollars and ninety-four cents, paid for taxes, with interest thereon; and the interlocutory judgment entered upon the said referee's report decreed that the said mortgage was valid and that the amounts above stated were due thereon.

The premises sold for four hundred dollars, which was less than the amount due the defendant James F. Morrisey on the said mortgage for principal, interest and taxes paid by him and additional taxes which were liens upon the property at the time of the sale.

On this motion the question is whether the mortgagee is entitled to payment of the amount due on his mortgage before the payment of the costs and disbursements of the action.

The plaintiff chose to make the mortgagee a party defendant and alleged the invalidity of the mortgage, thus making it necessary for the mortgagee to defend and assert the validity of his claim. The mortgagee having succeeded at the trial and his mortgage having been declared to be a first lien upon the property, there is no reason in law or equity why he should suffer a loss by having the costs of the unsuccessful plaintiff and the other defendants, whose interests were identical with the defendant Morrisey's interests, paid out of the proceeds of the sale.

In the case of Beller v. Antisdel, 84 Hun, 252, it was held, in an action of partition, where a mortgagee is brought in as a party defendant and it is proposed to pay such mortgage from the proceeds of the sale of the property upon which

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the mortgage is a lien, the costs of the partition action should not be deducted from the proceeds of the sale before applying the same in extinguishment of the mortgage, unless the mortgagee has unnecessarily increased the costs and expenses of the litigation.

In the Beller case, the plaintiff did not attack the validity of the mortgage, while, in this case, the mortgage was attacked and the plaintiff brought the action for a partition or sale of the premises upon the assumption that the mortgage was invalid. And, inasmuch as the plaintiff failed in that contention, the claim of the mortgagee that the amount due him should be first paid out of the proceeds before the deduction of any costs is stronger and more meritorious than was the claim of the mortgagee in the Beller case; and it would be inequitable to compel the mortgagee to bear any part of the costs of this action, especially the costs and disbursements incurred by the plaintiff and the defendant Robert Morrisey, in their effort to defeat the mortgagee's claim.

The final judgment should provide that the necessary expenses of the sale and the taxes which were a lien upon the property at the time of the sale be first paid, and that the balance in the hands of the referee be paid to the defendant James F. Morrisey on account of the amount due him on said mortgage.

Ordered accordingly.

THE CORTLAND SAVINGS BANK, Plaintiff, *v.* FREDERICK S. LIGHTHALL et al., Defendants.

(Supreme Court, Oneida Special Term, March, 1907.)

Foreclosure of mortgages on land — Foreclosure by action and sale — Sale: Notice — Sufficiency of publication; Setting aside sale — Inadequacy of price.

Where, on foreclosure sale, the premises are purchased by the plaintiff in the action, the only bidder, for $11,035.19, and, upon a motion to confirm the referee's report of sale, the plaintiff's affidavits tend to show that the purchase price was reasonable, and no infants' interests are involved, the affidavits of six persons, read

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in opposition, stating that in their opinion the market value of the premises was from $12,000 to $14,000, are insufficient to justify setting aside the sale for inadequacy in the purchase price.

Where the sale took place on Tuesday, January 8, 1907, a notice of sale published twice in each week for three successive weeks immediately preceding the day of sale, the first publication being Tuesday, December 18, 1906, is sufficient; and a contention that both the first and last days of publication should be excluded is erroneous.

MOTION by plaintiff to confirm referee's report of sale in real estate foreclosure action. Frederick S. Lighthall, mortgagor, and Title Trust & Guaranty Company, junior mortgagee, defendants, oppose the motion and demand a resale.

Ernest J. Edgcomb, for plaintiff.

Oliver D. Burden, for defendant Lighthall.

William H. Harding, for defendant Title Trust & Guaranty Company.

DE ANGELIS, J. The sale is attacked on three grounds: *First,* that the publication of the notice did not satisfy the statutory requirements; *second,* that the sale was not fairly conducted, and *third,* that the price was inadequate.

The premises were a house and lot on James street, in the city of Syracuse. The sale took place January 8, 1907. The plaintiff purchased the property at the sale for $11,035.19, just the amount of the mortgage debt, costs, unpaid taxes and expenses of sale. There was no other bid.

The defendants read the affidavits of six persons as to the value, three lawyers, two real estate agents and one whose occupation is not disclosed. Their valuation ranges from $12,000 to $14,000. Their manner of describing value is peculiar. The two who give "market" value use the expression "fair and *intrinsic* market value." One of these puts such value at $13,000 to $14,000, but says that on a resale he would bid or cause to be bidden only $12,000 for the prop-

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erty. The other puts such value from $12,000 to $13,000. The other four fail to give "market" values and use the expressions, respectively, "fairly and intrinsically worth the sum of from $13,000 to $14,000," "in his estimation is actually and intrinsically worth the sum of at least $12,000 to $13,000," "intrinsically worth the sum of $14,000," and "fair and reasonable value is the sum of about $14,000."

I assume, however, that these affiants intended to express their opinion of the market value of the property, but do not think that they make out a case of inadequacy in the purchase price which would justify setting aside the sale, within the authorities, if, in other respects, the case was a proper one to call for such relief.

The plaintiff's affidavits tend to show that the purchase price was reasonable.

In addition, it appears that there are no infants' interests involved; that both of the complaining defendants were represented at the sale, and that one of them, the junior mortgagee, is a trust company having the next lien to that of the plaintiff's mortgage, for an amount far in excess of the difference between the plaintiff's bid and the highest valuation of the property suggested by the defendants, and presumptively quite able to have protected itself.

The claim that the sale was unfair seems to rest on the theory that the plaintiff designed to get the property for its debt, costs, taxes and expenses of sale, with some undisclosed purpose, and to accomplish that end did something to discourage and prevent bidding. It appears that when the sale was called the referee announced that it would be a cash sale. This was unusual, although not illegal. But, upon the request of the representative of the junior mortgagee, the terms of sale were changed so as to provide for a down payment of ten per cent. of the purchase price. It is not improbable that the referee and the plaintiff's attorney assumed that no one would bid more than the mortgage debt, costs and expenses of the sale, and announced in the first place a cash sale for that reason. If that was their idea, it seems to have been justified, because no other bid was made. It is claimed that some of the persons attending the sale

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departed when the announcement was made that it was to be a cash sale. There were eight persons present when the sale actually took place and the only one of those that makes an affidavit that any person present when the sale was called departed before it was closed is the defendant William S. Lighthall. This affiant says a number of persons departed from the sale, but mentions no names. No one makes an affidavit that he left the sale because of the announcement that the sale was to be a cash sale. It appears that a written notice was served by the attorney for the mortgagor upon the referee, before the sale, which was publicly read and in which it was claimed that the sale had not been legally advertised. If persons attending the sale departed before its close, may it not be fairly said that this notice was as much the cause of their withdrawal as the announcement of a cash sale? The affiant Lighthall states that one Cogswell informed him that he intended to bid at the sale but that prior thereto one Webb, who made the bid for the plaintiff, told him that he, Webb, intended to bid for the plaintiff the face of its mortgage, and that the property was in bad condition and needed extensive repairs and painting. The affiant does not say that Cogswell stated that he failed to attend the sale on account of the talk, nor does he disclose what Cogswell proposed to bid for the property. No affidavit was made by Cogswell. The affiant Lighthall stated that the property was not in a bad state of repair and that the total cost of repainting and putting it in perfect *exterior* condition would not exceed $150. In the only other affidavit on the subject used by the defendants, the affiant states " that, upon inspection, the *exterior* property seemed to him in a good condition and state of repair and that only a very small sum of money, if any, would need to be expended in order to put the premises in perfect condition and appearance."

It also appeared that the plaintiff's attorney refused to postpone the sale.

In view of these circumstances I cannot say that the sale was unfairly conducted.

The principal contention of the defendants is that the notice of sale was not sufficient in law.

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In this connection it is not disputed that the attorneys for the two complaining defendants were served with printed copies of the notice of sale on the eighteenth day of December, and that on that day a printed copy of the notice was posted in three public places in the city of Syracuse. The statute did not require this.

As noted above, the sale took place on Tuesday, January 8, 1907. The notice of sale was published in the *Post-Standard,* a daily newspaper published in the city of Syracuse, in the month of December, 1906, on Tuesday, the eighteenth, on Friday, the twenty-first, on Wednesday, the twenty-sixth, and on Friday, the twenty-eighth, and in the month of January, 1907, on Wednesday, the second, on Friday, the fourth, and on Tuesday (the day of sale), the eighth. I regard the last publication as of no consequence.

Section 1678 of the Code of Civil Procedure required publishing "notice of the sale at least twice in each week for three successive weeks immediately preceding the sale."

It has been repeatedly held that a week is the period of time between midnight Saturday and midnight of the following Saturday. The notice was published twice in each week for the three successive weeks immediately preceding the sale, as appears from the dates of the publication above stated.

Again, assuming that the notice should have been published twice in each of three successive periods of seven days immediately preceding the sale, it was so published. There were two publications in the period of seven days from January seventh to January first, both inclusive (counting backwards), two publications in the period of seven days from December thirty-first to December twenty-fourth, both inclusive, and two publications in the period of seven days from December twenty-third to December sixteenth, both inclusive.

But the defendants claim that the statute required the first publication to have been at least twenty-one days before the day of sale. In this, I think, they are mistaken. If the notice was published twice in each of the three successive weeks immediately preceding the sale and the first publica-

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tion was less than twenty-one days before the day of sale, the language of the statute would have been satisfied. Such a notice has been held to be good. Wood v. Morehouse, 45 N. Y. 368; Valentine v. McCue, 26 Hun, 456.

But the first publication was twenty-one days before the day of sale. In the case of such a notice, the statutes provide that, in computing the time, the day of the first publication shall be excluded, but the day on which the sale is to take place shall be included. The position of the defendants is that both these days should be excluded, because, they say, that this notice was one day short, and they invoke section 27 of the Statutory Construction Law. That section requires no such computation. It is not and was not intended to be in conflict with section 787 of the Code of Civil Procedure, which provides as follows: "The period of publication of a legal notice, in an action or special proceeding, brought in a court, either of record or not of record, or before a judge of such a court, must be computed, so as to exclude the first day of publication, and include the day, on which the act or event, of which notice is given, is to happen, or which completes the full period of publication."

After December eighteenth, the day of the first publication, there were thirteen days in December and, including the day of sale, there were eight days in January, making the first publication twenty-one days before the sale.

This construction of the law has been universally recognized, I believe, by the profession and has been approved by the courts. Bunce v. Reed, 16 Barb. 347; Taylor v. Corbiere, 8 How. Pr. 385; Ball v. Mander, 19 id. 468.

Market National Bank v. Pacific National Bank, 89 N. Y. 397, cited by the defendants, is easily distinguished from the case at bar.

The motion to confirm is granted.

Motion granted.

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THE FIRST NATIONAL BANK OF WATERLOO, Plaintiff, v. LEONARD STORY, Defendant.

(Supreme Court, Seneca Trial Term, March, 1907.)

Principal and surety: Discharge of surety — Accepting successive bonds; Remedies of creditor — Necessity for demand on surety. Bonds — Breach — What constitutes breach — Necessity for demand.

In January, 1901, defendant with certain other of the stockholders of a domestic corporation, as security for loans and other pecuniary accommodations from a bank, jointly and severally executed an indemnity bond which recited that it was intended to be a full, complete and perfect security and indemnity to said bank for one year for any indebtedness or liability of any kind owing by the corporation to the bank from time to time and should be valid and continuous without other or further notice to them, and provided that the liability thereunder was not at any time to exceed $15,000 and interest. In January, 1902, a new and similar bond was given by the same persons to secure all then existing indebtedness of the corporation to the bank, as well as all that should be contracted within one year, subject to the same limitation as to the liability. The corporation was adjudicated bankrupt in the following July, at which time the bank held its notes and obligations under discount to the amount of about $60,000 in addition to $7,500 in mortgage bonds issued by it in 1894 and acquired by the bank before the execution of the second indemnity bond. In 1904, before said mortgage bonds had matured, an action was brought against the defendant upon the bond of 1902 and a verdict directed for plaintiff to the amount of notes with interest discounted after the execution of said bond which amount, with interest, was paid without the entry of judgment. In an action against defendant, as the only solvent surety upon the bond given in 1901, which was produced on the trial by plaintiff, to recover the amount of the mortgage bonds which had been acquired before the execution of the second indemnity bond, the defendant plead in bar the former recovery and payment.

Held, that whether the bond of 1902 was a substitute for the previous one was a question of intention and, there being nothing in the form of the bond of 1902 which necessarily indicated such an intention and the earlier bond not having been surrendered or canceled, the presumption was that it remained in force.

The bond containing an absolute guaranty of "prompt payment at maturity of each and all the notes * * * and other obliga-

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tions in writing" of said corporation, no demand upon defendant was necessary before suit, although, by a subsequent clause, the sureties, in case of default of any of the obligations mentioned, covenanted and agreed to pay the same to the bank upon demand.

ACTION against defendant as one of six sureties upon a bond given to the plaintiff for the benefit of the Waterloo Organ Company, January 31, 1901. The following is a copy of the bond:

"WHEREAS, the Waterloo Organ Company, a domestic corporation formed under the laws of this state, desires to obtain loans, discounts, credits and other pecuniary accommodations of and from the First National Bank of Waterloo, N. Y., and

"WHEREAS, the said bank requires security for such loans and discounts and for all other indebtedness or liability of the said company to it, and

"WHEREAS, the undersigned are interested in said company as stockholders, or otherwise, and are willing to become such security:

"*Now, Therefore,* for the purpose aforesaid and in consideration of the sum of One Dollar to each of us duly paid at the ensealing and delivery hereof, and for other good and valid consideration, the receipt of which is hereby acknowledged and confessed, we, the undersigned, do hereby jointly and severally for ourselves and our and each of our heirs, executors and administrators, guarantee and warrant unto the said bank, its successors and assigns, the prompt payment at maturity of each and all the notes, checks, drafts, bills of exchange, and other obligations in writing of every name and kind, made, signed, drawn, accepted or endorsed by the said Waterloo Organ Company, which the said bank now has, or which it may hereafter have, hold, purchase or obtain within one year from date hereof, but our liability hereunder shall not at any time exceed the sum of Fifteen thousand Dollars ($15,000) and interest thereon.

"And in case default is made in the payment at maturity of any of the above mentioned obligations, or in the payment of any lawful claim or demand held by said bank against

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said company, we do hereby jointly and severally covenant, promise and agree to pay the same to the said bank, its successors or assigns upon demand.

"This instrument is intended to be a full, complete and perfect security and indemnity to the said bank, to the extent and for the time above stated, for any indebtedness or liability of any kind owing by the said company to it from time to time, and to be valid and continuous without other or further notice to us or to any of us.

"*In Witness Whereof*, we have hereunto set our hands and our respective seals this 31st day of January, A. D. one thousand nine hundred and one.

"A. C. REED
"MALCOLM LOVE
"F. W. HULBERT
"FRANCIS BACON
"LEONARD STORY
"C. G. REED."

(Acknowledged same day).

Hammond & Hammond, for plaintiff.

George E. Zartman, for defendant.

FOOTE, J. This action was tried at the Seneca Trial Term before the court without a jury, and has since been submitted upon briefs of counsel.

The plaintiff seeks by this action to hold defendant liable as the only solvent surety upon a bond given by the Waterloo Organ Company to the plaintiff on the 31st day of January, 1901, for the amount of fifteen mortgage bonds of the Waterloo Organ Company of the denomination of $500 each, being part of an issue of eighty bonds made December 1, 1894, the fifteen bonds in question having been acquired by the plaintiff in the month of July, 1901.

The principal defense is that, in the month of January, 1902, a new indemnity bond was made by the Waterloo Organ Company to the plaintiff, on which the defendant was also a surety, in the same form and to the same effect as the bond in suit, which, by its terms, was made to secure all

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then existing indebtedness of the organ company to the plaintiff, as well as all that should be contracted within one year, subject to the same limitation of $15,000 at any one time, and that this latter bond was intended as a renewal of and substitute for the bond in suit.

It appears that the Waterloo Organ Company became insolvent and was adjudged a bankrupt about July, 1902, and at that time the plaintiff held its notes and obligations under discount to the amount of about $60,000, in addition to the mortgage bonds involved in this case. Subsequently, and in July, 1904, but before the mortgage bonds involved in the present case became due, the plaintiff brought an action against this defendant upon the last indemnity bond, given by the organ company in January, 1902, and alleged as a ground of recovery a large number of promissory notes made or indorsed by the organ company and discounted by the plaintiff for its account between January and July, 1902. The action came to trial in March, 1905, and the plaintiff, as a basis for recovery, proved the making of the indemnity bond in January, 1902, and the discount by it thereafter of a large number of promissory notes for the organ company, a schedule of which was annexed to the complaint, amounting in all for principal to $14,991.71, and for accrued interest to $2,174.25, making in all $17,165.96; and for this amount the court directed a verdict in favor of the plaintiff. No judgment was entered upon this verdict because of the defendant's request that none should be entered, and, within a few days, the defendant paid the plaintiff the amount of the verdict with costs of the suit, and the plaintiff delivered to the defendant the promissory notes which had been proved at the trial as a basis for recovery.

This recovery and payment defendant now pleads as a bar to a recovery here.

It will be seen that the question presented is: Was the indemnity bond of January, 1902, a substitute for the bond of the previous year, or did the latter remain in force? This depends, I think, upon the intent of the parties. There is nothing in the form of the bond of 1902 which necessarily indicates an intention that it should supersede or be a sub-

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stitute for the bond of 1901. It appears, however, that the Waterloo Organ Company had had an account at the plaintiff's bank since some time prior to 1896 and, from 1896 to 1902, one of these indemnity or guaranty bonds was given to the bank on behalf of the organ company each year, except in the year 1900, when three bonds were given, each to run four months — one in January, one in May, and one in September. Each of these bonds contained the limitation of liability to the amount of $15,000 and interest at any one time. Each provided that it was to be security for the indebtedness then existing and such as should be incurred within one year from its date, not to exceed $15,000 and interest, except the three bonds made in 1900, which were in the same form and to the same effect, except that they were made to cover existing indebtedness and such as should be incurred within four months. The same form of bond was used for the years 1896 to 1898, when a slight change was made in the form, without altering the legal effect of the contract, not material to be noted here; but, from 1898 to and including 1902, precisely the same form was used as the bond now in suit, except in the year 1900, when each bond was made to run for four months instead of one year, and except that there was some slight change of sureties. The defendant was a surety upon the first bond of 1896, upon the three bonds of 1900, and upon the bonds of 1901 and 1902. It does not appear whether he was also a surety upon the bonds of the other years.

From the circumstance that these bonds were made practically once a year over a period of seven years and that each bond was made in form to cover all existing liability of the organ company to the bank, as well as indebtedness to accrue for the year to come, and that each contained the same limit of liability to $15,000 and interest, the defendant contends that each bond was a renewal of its predecessor; that a novation took place and each bond became a substitute for the preceding one which remained no longer in force. The course of business in respect to the giving of these annual bonds over so many years is quite strongly suggestive of a probability that they were intended to be renewals rather than

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additional obligations to those already made; but this probability, if it may be so called, is not supported by any evidence of an actual intent from which a finding of fact to that effect can be made. It is not claimed that, when the bond of 1902 was made, the previous bond of 1901 was surrendered or cancelled. The contrary appears, for the plaintiff is in possession of, and produced on the trial, the bond of 1901. No evidence is offered by the defendant, as to the circumstances under which any of these bonds were made. If the defendant, or any of his cosureties, were asked at any time to sign a renewal bond or a bond to continue the same liability, the fact was not proved or offered to be proved upon the trial. For aught that appears here, the indebtedness of the organ company to the bank may have increased at the end of the year 1901 and the defendant may have been asked to sign an additional bond for an additional $15,000 for the purpose of increasing the limit of liability. If these bonds were intended as renewals or substitutes for each other, the best evidence to show that intent would be the transaction itself. Was a new bond asked for by the bank; if so, for what purpose? What reason was given for wanting another bond? What request, if any, was made of the defendant to sign? Where a public officer renews his bond from year to year, or from term to term, the new bond does not supersede the old one in respect to a liability which has already attached under the old bond; but, where a new bond or obligation is intended to take the place of or supersede the prior one, the best evidence of such intent is found in the surrender and cancellation of the prior instrument. And, where the prior instrument is not surrendered or cancelled, the presumption must be that it remains in force, unless a contrary intent clearly appears from the new instrument.

This question arose in respect to a bond and contract executed by the First National Bank of Buffalo upon its designation by the Canal Board to receive the deposit of canal tolls in the years 1880 and 1881. This designation was made annually and a new contract and bond made for each of these years. The bond given in 1880, which ran to the People of the State, was conditioned that the bank should do and per-

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form all things contained in the contract on its part to be done and performed, and that it would well and faithfully account for and pay over all moneys deposited with it or for which it should become liable in and by said contract, and that the bank should account for and pay over all moneys then on deposit in said bank or due or to become due thereafter to the People. One Cushing was the surety upon this bond. At the time the bond was given there was on deposit of canal tolls in the First National Bank of Buffalo, $65,000. During the year 1880 the bank received $73,569 and the treasurer drew out $68,323.03, which, with the accrued interest, left a balance due the State of $7,300. March 31, 1881, the bank was again designated and the same form of bond was made, covering the amount then on deposit and such as should be received during the year, which bond was signed by other sureties, but not by Cushing. The bank became insolvent in April, 1882. During the year 1881 there had been deposited $32,421.46 and withdrawn by the treasurer, $35,000, leaving a balance due of $10,422.46. The State, through the Attorney-General, brought an action upon the bond of 1880 against Cushing to recover the balance which the bank had received and had on hand at the close of the business of that year. Mr. Cushing very stubbornly contested his liability, claiming that the new bond of 1881, on which he was not a surety, superseded and took the place of the bond signed by him; that, in express terms, it covered the liability of the bank for the fund on deposit at the close of the year 1881, and so was coextensive with the old bond, and that, although the old bond had not been surrendered or cancelled, taking the new one was an accord and satisfaction in respect to the old one. The learned referee before whom the case was tried (the late Mr. Moak of Albany) held with Mr. Cushing and dismissed the complaint. On appeal this judgment was reversed (People v. Cushing, 36 Hun, 483) and, in a very carefully considered opinion in the General Term by Learned, P. J., it was held that the acceptance of the new bond did not of itself supersede or take the place of the prior bond and was not an accord and satisfaction; while such would have been its effect if so intended, that

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there was no proof of such an intent. It seems that this case was never retried for the reason that the People recovered the whole amount involved in another action against the sureties upon the bond of 1881. Barnes v. Cushing, 43 App. Div. 158. The case against the sureties on the bond of 1881 went to the Court of Appeals, and is reported *sub nom.* People v. Lee, 104 N. Y. 441.

The State having collected from Barnes, the surety on the bond of 1881, he brought an action for contribution against Cushing as surety on the bond of 1880 in respect to the amount on deposit in the bank at the close of the year 1880. In this case the question was directly presented as to whether the bond of 1881 superseded the bond of 1880, and the learned Appellate Division in the First Department held that it did. Barnes v. Cushing, 43 App. Div. 158.

The case came before the Court of Appeals (Barnes v. Cushing, 168 N. Y. 542) and the question was there discussed at length by able counsel as to whether from the form of the bond and the nature of the transaction an intent was not shown that the new bond of 1881 should supersede and take the place of the previous bond of 1880, upon which Cushing was surety, and that learned court held, in an opinion by Bartlett, J., that such an intent would not be inferred or presumed in the absence of other evidence to support it.

I deem this decision controlling in the present case. The appointment of the First National Bank of Buffalo to receive the canal deposits was an annual appointment for a fixed term, requiring a new contract and bond each year. There was much reason for a surety upon one of these bonds to assume that his liability would end with the year upon a new appointment and a new bond being given The new bond covered in express terms the very liability for which Cushing was subsequently held, namely, for the moneys on deposit in bank at the close of the year 1880. If, under these circumstances, no intent can be found from the transaction itself that the new bond should supersede the old one, much less can such an intent be found in the present case as a fact from the form of the bonds and the nature of the transaction alone.

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The bonds in the case at bar are each limited to $15,000, while the bonds which Cushing signed were unlimited in amount. It is urged for the defendant that this is a circumstance of importance. It is pointed out that the bond of 1902 covered not only the organ company's liabilities to be incurred in that year, but all liabilities existing at the date of the bond, and that, by the express terms of the bond, defendant's liability for both is limited to $15,000. If the present suit were upon the bond of 1902, there would be no answer to the defendant's contention in this respect; but it must be held that the defendant's liability upon the bond of 1901 is in nowise affected by the terms of the later bond. They are separate and independent contracts and afford no intrinsic evidence of an intent on the defendant's part to limit his liability under both bonds to $15,000.

Defendant also contends that a demand upon him is necessary before an action can be maintained upon this guaranty bond. This question was raised in the first instance by demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action in that it failed to allege any such demand. This demurrer came to argument at Special Term and was overruled, whereupon the defendant answered. It is urged that the decision overruling the demurrer should be reconsidered here, for the reason that the learned judge misapprehended the precise grounds of the defendant's demurrer, as shown by his written opinion, in which he discusses only the question of the necessity of a demand upon the organ company, while it was the want of a demand upon the defendant himself which is complained of. It does not follow that the defendant's point was not considered at the Special Term because nothing is said about it in the opinion. It was necessarily involved and so decided; but, whether controlling here or not, I think the point is not well taken. The bond contains an absolute guaranty of "prompt payment at maturity of each and all notes * * * and other obligations in writing of every name and kind made * * * by said Waterloo Organ Company." If a guaranty of payment had been indorsed upon the mortgage bonds in suit and signed by the

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defendant, it is certain that no demand upon the defendant before suit would be necessary. The legal effect of the guaranty is precisely the same as if it had been indorsed upon these particular bonds. The subsequent clause of the bond, by which the sureties, in case of default in payment of any of the obligations mentioned, covenant and agree to pay the same to the bank upon demand, does not change the nature of the guaranty contract. It is an additional agreement not intended to limit the force and legal effect of the preceding clause; and, under the authorities, no demand was necessary. Douglass v. Howland, 24 Wend. 35; Genesee College v. Dodge, 26 N. Y. 213.

It follows that the plaintiff is entitled to judgment for the amount of the principal of the mortgage bonds, with unpaid interest and costs.

Judgment for plaintiff.

JENNIE T. HUTCHINSON v. JOSEPH HUTCHINSON.

(Supreme Court, New York Special Term, March, 1907.)

Divorce — Evidence — Quantity of proof and probative effect of evidence — Adultery — Co-existence of opportunity and inclination.

Where, in an action for absolute divorce, the plaintiff relies upon circumstantial evidence and situations claimed to necessitate the conclusion of adulterous conduct upon the part of defendant, the court must inquire whether opportunity for and inclination toward wrongdoing have been sufficiently proved.

The evidence as to inclination as well as opportunity must be such as to lead a reasonable man to conclude that the adulterous act has been committed; and mere opportunity, even though prolonged and inviting, cannot, in itself, be a sufficient basis upon which to predicate inclination toward wrongdoing.

ACTION for an absolute divorce.

Stern, Singer & Barr, for plaintiff.

James B. Butler, for defendant.

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BLANCHARD, J. This is an action for an absolute divorce in which the plaintiff has failed to prove any carnal act, but relies upon circumstantial evidence and situations which she claims necessitates the conclusion of adulterous conduct on the part of the defendant. From the necessities of proof in actions for divorce the court must usually deduce from circumstantial evidence the fact of wrongful conduct on the part of the guilty party, and in considering the evidence the court must inquire whether opportunity for wrongdoing and inclination toward wrongdoing have been sufficiently proved. The elements of opportunity and inclination must both be present. The evidence as to inclination as well as opportunity must be such as to lead a reasonable man to the conclusion that the adulterous act has been committed. Moller v. Moller, 115 N. Y. 466; Pollock v. Pollock, 71 id. 137; Allen v. Allen, 101 id. 658; Roth v. Roth, 90 App. Div. 87; affd., 183 N. Y. 520; Warren v. Warren, 8 Misc. Rep. 189. The evidence in the present case shows that for a year and a half the defendant was a frequent visitor at the apartment of the corespondent, an unmarried woman; that he visited her apartment on an average of twice a week, frequently taking meals at her table and often spending the evening in her home; and that on five or six occasions while the corespondent's nephew, who lived with the corespondent, was present, he slept in her apartment. Although the defendant's own family resided in the neighborhood, they appear to have been entirely unaware of the existence of the corespondent, notwithstanding the intimacy which so long existed between her and the defendant. The evidence on the part of the defendant shows that his intimacy with the corespondent grew out of friendship of many years' standing. The defendant attempts to explain his constant attendance at the corespondent's home on the ground that he was experimenting in her rooms with a new kind of gas burner, and that, being a sufferer from diabetes, he was served at intervals at the corespondent's house with food specially prepared for victims of that disease. His testimony, it is submitted, strengthens rather than weakens the case of the plaintiff. Considerable testimony was introduced tending

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to show that the defendant was known among the janitors and servants in the apartment-house of the corespondent as her husband. The evidence taken in its entirety obviously shows opportunity for wrongdoing on the part of the defendant. It fails, however, to establish satisfactorily the inclination of the defendant toward adulterous conduct. "Charges of this kind," said Herrick, J., in Smith v. Smith, 89 Hun, 610, "are only to be established by clear and convincing evidence; they are so serious in their character, and the results so grave, that a court should hesitate before making a finding of guilty except when thoroughly satisfied of the truth of the charge." In searching the evidence for proof of inclination toward adulterous conduct "the circumstances must be sufficient to satisfy the mind that the adulterous intercourse has actually taken place. Though presumptive evidence alone is sufficient to establish the fact, the circumstances must lead to it, not only by fair inference, but as a necessary conclusion. Appearances that are equally capable of two interpretations will not justify the presumption. Loveden v. Loveden, 2 Hagg. Cons. R. 3, 4;" Pollock v. Pollock, *supra*. Mere opportunity, even though prolonged and inviting, can in itself never be a sufficient basis upon which to predicate inclination toward wrongdoing. In Hart v. Hart, 2 Edw. Ch. 207, Vice-Chancellor Edwards refused to confirm the report of a referee upon the ground that it "merely sets forth that the defendant is living separate from his wife and has a woman residing with him. No other cohabitation is proved." Folger, J., writing the opinion of the court in Pollock v. Pollock (*supra*), said (146): "My judgment concurs with that of Vice-Chancellor Edwards I think that proof of the parties charged, being alone together in a set of rooms at times, and passing many days in succession together there, and some evenings, is not of itself sufficient to sustain the allegation. There should be some accompanying circumstances, fitted to fairly induce a belief that it was not for a proper purpose. The being thus together, to be sure, gives opportunity. There must be more than that; some circumstances to show a disposition to avail themselves of the opportunity, and to ground an inference that they have actually

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done so. Harris v. Harris, 2 Haggard, 376. The court must be satisfied that a criminal attachment subsisted between the parties, and that the parties intended to indulge in the intercourse for which they had opportunity. Davidson v. Davidson, D. & S. 132, 135; Dunham v. Dunham, *supra;* Burgess v. Burgess, 2 Hagg. Cons. R. 228. Even the repeated going of a married woman to the private rooms of an unmarried man, who was the alleged paramour, was not held enough without evidence of improper conduct while there, to warrant judgment that the adulterous act had been committed (Williams v. Williams, *supra;* and see Westmeath v. Westmeath, 2 Hagg. Supp. 1; 4 Eng. Ecc. R. 238–244)." Upon the authority of these cases it must be held that the persistence of the defendant's presence in the home of the corespondent and his constant visits there are no sufficient basis upon which to predicate an inclination toward adulterous conduct. The testimony of the janitors and servants that the defendant was known as the husband of the corespondent is not entitled to much weight. In the words of Folger, J. (Pollock v. Pollock, *supra,* 149): "Now, it is to be observed of this testimony, in the first place, that it does not appear that the plaintiff ever knew that she was spoken to, or of, as his wife, or that she was so considered. He is not to be affected by those facts without such knowledge." Furthermore, abundant testimony was given by persons familiar with the corespondent's household that the defendant was always introduced and known by his true name. Finally, there is a complete failure of evidence of any terms of endearment of any kind, or of surprise in a compromising position, or of any other visible token of an inclination toward wrongdoing on the part of the defendant. No better comment upon these circumstances can be made than was expressed regarding a similar state of facts in Pollock v. Pollock, *supra,* 147: "It cannot escape the attention on a perusal of the testimony that no witness speaks of an act, or gesture, or word or look, of indecent or even of undue familiarity, on the part of either the plaintiff or Miss Halpin towards the other. Though the rooms in which they were shown to be together were the place of his business,

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and it is shown that people went in and out there frequently; that other females went there, one of whom is designated by name; that there was a boy employed there by the plaintiff, whose name and residence are given; that a woman, whose name and residence were given, was used to go there to do housework; though the occupation of Miss Halpin while there was open to the observation of the witnesses; there is no proof of a kiss, or an embrace, or a contact or nearness of person, or an endearment of any kind, or of a surprise in an equivocal situation, or of confusion of face on a sudden entrance, or anything clandestine in conduct, or which showed a desire for secrecy or concealment, (see Dunham v. Dunham, 6 Law Reporter, 139, 141). Here is opportunity existing for at least three years, with the parties directly in the notice of the witnesses, who are of a class not likely to avert their faces if anything suspicious takes place, or to refrain from comment upon it, and not a single hint in the testimony that the usual signs were given that the opportunity was availed of. It is contrary to the usual experience of mankind, not only as gathered in one's own observation, but as disclosed by the reports of such cases, that if such relations existed between these two persons as are charged, they should not, at some time during the period, have incautiously or recklessly betrayed the fact by some of the means above specified. If the opportunity merely, is shown, there being no evidence of the will to improve it, this does not justify the inference of guilt; it must be further shown that the parties were together under suspicious circumstances, not to be easily accounted for unless they had the corrupt design (Mayer v. Mayer, 6 C. E. Green [N. J.], 246)." See also Steppens v. Steppens, 16 Daly, 363. Upon the ground indicated the complaint herein should have been dismissed, and accordingly the report of the learned referee is not confirmed.

Ordered accordingly.

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GRANT D. CARMER, Plaintiff, v. JESSIE STILL, Defendant.

(Supreme Court, Erie Special Term, March, 1907.)

Former adjudication — What matters are concluded — Matters not in issue — Subsequently acquired interest or title.

Where two successive assignments are made of the interest of the assignor in the estate of a deceased person and the junior assignee recovers a judgment establishing the invalidity of the prior assignment for fraud and misrepresentation and the senior assignee thereafter obtains from the assignee another assignment and brings suit against the junior assignee to set aside her assignment for fraud and misrepresentation, the former judgment, not being an adjudication of the validity of the junior assignment as against the assignor, does not conclude the senior assignee when claiming under his later assignment.

DEMURRER to the plaintiff's complaint.

E. W. Holt, for demurrer.

O. W. Nourse, opposed.

WHEELER, J. The action is brought to set aside an assignment of an interest in the estate of Lucina Miles to the defendant and also to restrain the enforcement of a judgment recovered by the defendant against the plaintiff.

The situation presented is peculiar. It appears from the complaint that, on June 15, 1904, Julia Trumble assigned to the plaintiff, Grant D. Carmer, all her interest in the estate of one Lucina Miles, deceased. Subsequently and on or about the 28th day of September, 1905, Julia Trumble executed a second assignment of the same interest to Jessie Still. Thereupon Jessie Still by virtue of this second assignment brought an action in this court to set aside the first assignment to Carmer, on the alleged ground that it had been obtained by fraud and misrepresentation. Carmer answered, the issues were tried, and the court decided adversely to Carmer and set aside the assignment to him.

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Immediately after the rendition of that judgment, Carmer, the plaintiff in this case, procured from the said Julia Trumble a third assignment of her interest in the estate of Lucina Miles. A copy of this assignment is attached to and forms a part of the complaint. This instrument recites the second assignment to Jessie Still and the fact, in substance, that it was obtained through fraud and misrepresentation. It purports to revoke the said second assignment to Jessie Still and authorizes the plaintiff, Grant D. Carmer, to institute an action to set aside and revoke the said assignment to Jessie Still. Thereupon, this plaintiff, Grant D. Carmer, brings this action, in which he alleges the facts above stated, setting up the judgment against him and in his prayer for judgment asks that the assignment from Julia Trumble to the defendant Jessie Still be rescinded and set aside, and also prays for a permanent injunction restraining the payment by the administrators of the estate of Lucina Miles to the said Jessie Still of the share purporting to be assigned to Jessie Still, and also restraining the defendant, Jessie Still, from enforcing the judgment against the plaintiff above referred to.

The defendant demurs on the ground that the complaint does not set forth a cause of action, claiming all the questions presented by the complaint have become *res adjudicata*.

The argument in support of the demurrer is made that the complaint shows that the very matter set up as an attack upon the assignment to Jessie Still would have been a defense to the former suit and might have been litigated therein, and that a judgment is a bar, not only as to issues actually raised and litigated, but also as to such as might have been raised and litigated within the purview of the action.

The general proposition of law is perfectly well recognized, but the real question remains whether in law and in fact the alleged fraudulent character of the second assignment given by Julia Trumble to Jessie Still was available to the defendant Carmer in the action brought against him to set aside the prior assignment to him by Julia Trumble. We think such a defense was not available to Carmer. As-

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suming the assignment to Still was procured by fraud as alleged in the complaint, nevertheless, whether Julia Trumble would rescind the assignment or not for that reason rested entirely with her and not with Carmer.

It is the settled law that the effect of fraud is not absolutely to avoid a contract induced by it, but to render it voidable at the option of the party defrauded; and the contract continues valid until the latter has determined his election by avoiding it. Railway Advertising Co. v. Standard Rock Candy Co., 24 Misc. Rep. 723. Citing 2 Add. Con.; Am. Notes by Abbott & Wood, 1888, m. p. 1178; Oakes v. Turquand, L. R. 2 H. L. Cas. 325; 6 Eng. R. C. 879.

The right to elect to treat the assignment to Still as void for fraud in its procurement was the right of Mrs. Trumble and not of Carmer; and, so long as Mrs. Trumble had not taken action, Carmer could not interpose as a defense to the action against him the fraud practiced on Mrs. Trumble.

As he was, therefore, in no position to raise such a defense, I cannot see that the judgment against him is *res adjudicata* on that question; nor can I see how Carmer can be estopped from alleging the fraudulent character of such assignment, he now having become the owner of the interest by virtue of a subsequently acquired interest.

The judgment against Carmer must stand, so far as it adjudicates the first assignment to him by Mrs. Trumble fraudulent and void, but there is nothing in that which forbids him upon a new and valid consideration acquiring and enforcing such interest as Mrs. Trumble has in the estate.

In so far as the plaintiff here seeks to vacate or set aside the judgment against him declaring the first assignment to him void, he must fail; and, if that were all there is to the complaint, the demurrer would be well taken. The plaintiff, however, goes further in his complaint and asks that the assignment to the defendant, Jessie Still, be declared fraudulent and void, and Jessie Still restrained from receiving any share of the estate purporting to be assigned. If he succeeds in maintaining the allegations of the complaint in that respect, then he would be entitled to an accounting from Jessie Still.

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In other words, Carmer now stands in the shoes of Mrs. Trumble by virtue of the last assignment and entitled to enforce against Still all the rights and remedies Mrs. Trumble had.

For these reasons the demurrer must be overruled, with leave to the defendant to answer within twenty days after service of the interlocutory judgment to be entered hereon, upon the payment of costs of this demurrer.

Demurrer overruled, with leave to defendant to answer within twenty days after service of interlocutory judgment, upon payment of costs of this demurrer.

JAMES S. MALLORY, Plaintiff, *v.* THE SARATOGA LAKE BRIDGE CO. and EGBERT E. EMIGH, Defendants.

(Supreme Court, Saratoga Trial Term, March, 1907.)

Toll roads and bridges — Use for travel — Right to collect toll — Limited to vehicles specified in charter.

A bridge company, maintaining a bridge carrying a highway across a lake and authorized by its charter to collect tolls for the passage of certain vehicles and animals, may not demand tolls for the passage of an automobile, which is not within the terms of its charter, but is limited to the tolls specifically granted.

ACTION for injunction restraining the defendant from imposing toll for the passage of automobiles over its bridge.

Walter P. Butler, for plaintiff.

John L. Henning, for defendant.

SPENCER, J. The defendant is a domestic corporation, incorporated under chapter 64, Laws of 1854, pursuant to which it has constructed and is maintaining a toll bridge across Saratoga lake. A public highway passes over the bridge. On the 10th of June, 1906, the plaintiff essayed to

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pass by means of an automobile and was not allowed, except by the payment of a toll of twenty-five cents. The plaintiff brings this action to restrain the defendant from the collection of toll, claiming a free passage for himself and automobile.

If we regard the defendant's bridge as a public highway, and I see no escape from that conclusion (Thompson v. Matthews, 2 Edw. Ch. 212, 216; Conklin v. Elting, 2 Johns. 410; 5 Cyc. 1050; 4 Am. & Eng. Encyc. of Law, 945), its right to exact toll is confined to the animals and vehicles specified in the act conferring the franchise. All other animals and vehicles must be presumed to have the right to cross free. The fact that automobiles were not known at the time of the passage of the act can make no difference, for the reason that defendants, by accepting the franchise in consideration for the right to collect the tolls stipulated for, assumed the duty and responsibility of building and maintaining a bridge that would meet the reasonable requirements of all travelers on the public highway, including vehicles and animals then in common use by travelers, and also such as might thereafter come into common use. Its power to collect toll is derived from the provisions of the franchise. It stipulated for no other or further right and may not exact toll except as therein provided. If it deems it necessary to require payment of toll from others, it must apply to the Legislature for authority so to do. Its powers must be strictly construed. South Stat. Const., § 378; Bloodgood v. Mohawk & H. R. Co., 18 Wend. 941; Auburn Plank Road Co. v. Douglass, 9 N. Y. 444; People ex rel. Third Avenue R. R. Co. v. Newton, 112 id. 396.

The contention which the defendant makes in its brief, to the effect that it has the right to prevent the plaintiff from crossing its bridge with his automobile on the ground that the bridge is not sufficiently strong to sustain the weight, is not within the issue raised by the pleadings. The answer admits that automobiles have come into common use and in crossing jar and weaken the structure more than ordinary vehicles, occasioning additional expense for maintenance, but it nowhere in the answer or by proof makes the claim that the

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plaintiff was restrained from crossing the bridge for that reason. The defendant was willing that its bridge should be used by automobiles provided the amount of toll which it exacted was paid. The only issue is whether the defendant is entitled to exact any toll as to automobiles.

It may very well be that an attempt to cross this bridge with an animal or vehicle not in common use by travelers and of such weight as to seriously endanger the bridge by passing over it might be prevented by the defendant in the reasonable exercise of its control; but no such claim is made; no such issue is before the court. The defendant contends that it may impose such toll as in its judgment it deems necessary in respect to the passage of automobiles. If it has such power, then it has authority also to fix whatever toll it may deem reasonable in respect to any person, animal or vehicle not specifically mentioned in its franchise. I think no such authority may be implied and that the defendant is limited to the tolls specifically granted to it by its franchise.

It follows that the plaintiff must have judgment for the relief demanded in the complaint, together with costs.

Ordered accordingly.

CARL SCHEFER, Plaintiff, *v.* THOMAS R. BALL, Defendant.

(Supreme Court, New York Special Term, March, 1907.)

Contracts — Interpretation of contract — Conditions precedent — Performance of conditions: Time of performance — Reasonable time; Waiver of conditions precedent.

Recording written instruments and notice of title — Sufficiency of record to constitute notice — Effect of defects in instrument.

Where an instrument was signed by fifteen lot owners upon a city street, covenanting that all buildings to be erected upon such lots should be set back seven feet from the front of the lots and that such covenant should be deemed to run with the land, and further providing that the instrument should be of no effect until all the parties should have first executed and acknowledged the same, or the same should have been duly proved before a proper officer, and where three of the parties failed to acknowledge the

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instrument and the original certificate of proof as to them was defective for its failure to state the address of the subscribing witness, but eight years thereafter a proper and valid certificate proving the execution of the instrument by such parties was made; and where during such period eight of the parties conveyed their lots by deeds not mentioning such restrictions, held, that, the proof of execution not having been made within a reasonable time nor until a majority of the signers had conveyed without recognizing its validity, the making of the certificate after the lapse of eight years was insufficient to give it validity.

The fact of a general observance of the terms of the agreement after it had been disregarded for eight years and the voluntary placing of the buildings erected on the lots in conformity with its provisions will not serve to render it obligatory.

Nor will the fact that defendant had notice of the agreement as recorded, since the record at the same time disclosed the want of due proof of execution which rendered the instrument ineffectual.

Moreover, the change in the character of the neighborhood from a residential to a business locality since the instrument was originally signed would be a sufficient reason for refusing an injunction to enforce the covenant.

ACTION for an injunction.

James, Schell & Elkus, for plaintiff.

Merrill & Rogers, for defendant.

DAVIS, J. This action is brought to enjoin the defendant from building in violation of certain restrictive covenants contained in an instrument under seal executed in 1846, and designed to affect the property on both sides of Thirty-seventh street, between Fifth and Sixth avenues. The plaintiff has owned and resided in No. 40 West Thirty-seventh street since 1886. The defendant owns Nos. 36 and 38 West Thirty-seventh street immediately adjoining plaintiff's property on the east. These lots are located between Fifth and Sixth avenues on the south side of Thirty-seventh street, and are about ninety-nine feet deep. The defendant is erecting upon his two lots a ten-story brick business building with its front coincident with the street line. The foundation of this building has been laid. The plaintiff seeks to enjoin

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its further progress, chiefly because of defendant's purpose to build upon the seven feet of land immediately south of the street line in alleged violation of the restrictive covenant referred to, and which forbade the erection of a building upon this space. This alleged covenant is contained in an instrument under seal executed on June 27, 1846, by fifteen persons constituting all except two of the owners of this land between Fifth and Sixth avenues, and recorded July 17, 1846, at the request of Abraham B. Embury, one of the parties executing it (Exhibit F). Gilbert Giles, the plaintiff's predecessor in the title to No. 40 West Thirty-seventh street, was one of the two lot owners who did not join in this instrument. Some of defendant's predecessors in the title to Nos. 36 and 38 (excepting the westerly one foot of No. 38) were parties to the instrument. But plaintiff claims that he is entitled to enforce this covenant by virtue of a certain agreement executed by Gilbert Giles, plaintiff's predecessor in title, on April 28, 1854 (Exhibit 1). This latter agreement recites the parties to and the terms of the agreement of June 27, 1846, to which Giles was not a party, the fact that Giles now is, and was, the owner of land on such part of Thirty-seventh street at the time of the execution of the agreement of June 27, 1846, and his desire to have that agreement to apply to all the lots on that part of Thirty-seventh street. It then provides that in consideration of the premises and of one dollar, "I do hereby, for myself, my heirs, executors, administrators and assigns, covenant and agree to and with said parties and each of them, and their respective heirs and assigns, to observe, keep and maintain the stipulations, agreements and covenants contained in said articles in respect to the land I own as aforesaid, with the like force and effect in all respects as fully as if I had been named in and had duly executed and acknowledged the same, hereby declaring that said covenants shall be deemed to be covenants running with my said land, and that all sales and conveyances therefor made by me shall contain a clause referring to said covenants." This instrument was executed by Giles only, and was recorded on July 28, 1854, at the request of Mr. Waddell of the parties who executed the agreement of June 27, 1846.

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However, the question of plaintiff's right to bring this action to enforce the covenant contained in the instrument of 1846 by virtue of the instrument thus executed by Giles is not now disputed. The point was raised by the defendant on the trial, but expressly waived, the defendant conceding for the purposes of the trial that the plaintiff has just the same right to bring this action as had the original parties to the agreement of June 27, 1846, but no greater right. The defendant, in other words, attacks the agreement of 1846 itself, and claims that by its terms it never went into effect, and that, therefore, no covenant was ever created thereunder. This contention requires an examination and construction of that agreement. It contains, among other things, a covenant requiring that all buildings to be erected on the lots of the various parties should be set back at least seven feet from the front of the lot, and it is expressly stated therein that the covenants shall be deemed to run with the land. It also contains the following provisions: "It is hereby also agreed and declared, that this instrument is not to have any effect or be of any force whatever, until all the parties herein named shall have first executed and acknowledged the same, or the same be duly proved before a proper officer." The defendant contends that this latter provision of the agreement was not complied with, and that, therefore, the agreement never became operative. He points out that while all of the fifteen parties named therein signed it, there was no proper certificate as to its execution, and the acknowledgment of its execution on the part of three of them, viz.: John Murray Ogden, Murray Hoffman and Lindley M. Hoffman. In other words, he contends that the agreement by its terms was not to go into effect unless it bore not only the signature of each party but also a proper written certificate of due execution and acknowledgment by each, made by a proper officer. The original agreement was produced at the trial and marked "Exhibit F." It bears the signatures of all the parties, together with certificates of acknowledgment of all but three of the parties. Its execution by John Murray Ogden, Murray Hoffman and Lindley M. Hoffman is attempted to be proved by a subscribing witness, one Shea, who

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appeared before Charles E. Shea, a commissioner of deeds, on July 10, 1846. The certificate of Charles E. Shea is written upon the instrument, but it omits to state the address of the subscribing witness, a prerequisite to the recording of the agreement. Notwithstanding this omission the instrument was recorded July 17, 1846, and from this certificate it appears that the subscribing witness was duly sworn, and thereupon deposed that he knew these three parties described in and who executed the agreement; that he was present and saw them sign and execute it, and that he thereupon signed his name as a witness. The question to be determined here is whether the agreement was executed in the manner provided in the instrument itself and, if not, whether the covenant ever had any binding force under this instrument. It is a question of construction of the agreement itself. Before the agreement can become binding by its terms it must be executed and acknowledged or duly proved before a proper officer. It seems clear that this provision requires something more than mere oral acknowledgments of its execution before an officer or a subscribing witness. It requires written certificates of proof. It was the purpose of the parties to create a freehold estate in the lands of each in favor of each of the others. Nellis v. Munson, 108 N. Y. 458. They attempted to do this by a sealed instrument. Keeping in view the necessity of giving notice to all subsequent grantees and of making proof of the document accessible at all future times, they provided that the instrument should be put in such shape as to official certificates as to permit it to be recorded and to make it prove itself under the statutes then in force upon a mere production of it or of a certified copy from the record, without other evidence of its execution. This intent is evidenced by the fact that the instrument bears certificates in some form or other as to the execution by each of the parties, and by the further fact that upon these certificates it was recorded. It happens that the certificate of the commissioner of deeds, Shea, fails to state the address of the subscribing witness. This omission would prevent the introduction in evidence of the instrument without other proof of its execution by the three parties named, i. e., those who

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made their acknowledgments before that subscribing witness. It follows, therefore, that as to these three persons the agreement was not duly proved before a proper officer as therein required. Irving v. Campbell, 121 N. Y. 353, 360. Nor was a proper certificate of the testimony of this subscribing witness attached to the instrument until May 19, 1854, when the witness appeared before a notary public, whose certificate in proper form is now attached to the agreement. In other words, the terms of the proposed agreement were not complied with until May 19, 1854, nearly eight years after the signing of the agreement. During the period intervening between 1846 and 1854, eight of the parties to the original agreement conveyed their holdings on both sides of Thirty-seventh street by deeds omitting any reference to the restrictions referred to. Among these conveyances was one by Murray Hoffman and wife, recorded July 28, 1846, and one by Lindley M. Hoffman, recorded May 6, 1848, and another by Lindley M. Hoffman and wife, made and recorded in October, 1850. It will be recalled that the signatures of the Hoffmans to the original agreement had not been properly proved by the certified testimony of the subscribing witness. The fact that so many of the original parties disregarded the agreement of 1846 by omitting from their deeds all reference to the restrictive covenant is a strong reason for concluding that they at least did not consider it as a binding agreement at that time. Bradley v. Walker, 138 N. Y. 291, 298. And, moreover, the question of the efficacy of the agreement of 1846 must have been discussed among and doubted by some of the original parties prior to May, 1854. The noncompliance with the terms of the agreement by so many of the original parties in failing to insert the covenant in their deeds doubtless attracted the attention of the other owners, and this fact, we may infer, led to the making of the new certificate on May 19, 1854, for the purpose of duly proving the signatures of John Murray Ogden, Murray Hoffman and Lindley M. Hoffman. The remedy adopted in 1854 to cure the defect shows clearly that its reality and seriousness were then appreciated. In view of these considerations we conclude that the covenants contained in the agreement

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of 1846 did not become binding, and were not deemed binding by many of the original parties, at least down to the making of the new certificate in 1854. Nor do I think that this new certificate gave the covenant any vitality. Had it been attached to the agreement within a reasonable time after its execution, and before any of the parties thereto had parted with their interest, doubtless the agreement would have become effective, but here the certificate was supplied nearly eight years later and after eight of the original fifteen signers of the agreement had conveyed their holdings to ten strangers to that agreement. The plaintiff urges another point in support of this covenant. He claims that the defendant may not now repudiate it, for the reason that defendant's predecessors in title had the benefit of the restrictive agreement of 1846 through the observance of it by other property-owners. It is a fact in evidence that all the buildings erected on these lots are built in substantial compliance with the covenant. But none of them was erected until about 1855, and at that time eight of the original parties to the covenant had parted with their lots by deeds that contained no reference to this covenant. Moreover, the evidence indicates that the covenant was not observed generally until about 1854, when there was an attempt to put life into it by adding a new certificate to the agreement. I apprehend that this general observance of an inoperative covenant after 1854 cannot make a perpetual observance of it obligatory. The plaintiff cites the case of Altman v. McMillin, 115 App. Div. 234, in support of his contention, but its application to the facts of this case is not apparent. In that case there was also an agreement under seal for a restrictive covenant as to building, and the agreement was not to be binding upon the parties or any of them until all said parties had executed the same. The plaintiff there contended that this covenant was not an incumbrance or cloud upon his title, because the agreement creating it was void and ineffectual for the reason that one of the parties signing it was not an owner of the premises which he claimed to represent and bind. The court simply held that the plaintiff was estopped from denying the truth of the recitals in the agreement to the effect that the parties

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were owners. Having thus decided that the agreement was valid on its face, the conclusion that it was an existing incumbrance necessarily follows. But in the case at bar the agreement on its face, unlike that in the case referred to, proves itself to be inoperative. It lacks the proof of execution called for by the agreement itself as a condition precedent to its becoming binding. Its incompleteness is obvious on mere inspection. The defendant here does not seek to vary or explain its terms or contradict any of its recitals as in the Altman case. Nor can it be said here, as in the Altman case, that the defendant, having reaped the benefit of the signatures of the other parties to the agreement, is estopped from denying its binding force, because, as a matter of fact, neither he nor his predecessors in title gained any benefit from those signatures. No one was bound by them. Whatever benefits accrued to the defendant by the actual restriction in the character and position of the buildings for so long a time were conferred voluntarily and not by virtue of the agreement of 1846. Plaintiff also cites the case of Tallmadge v. East River Bank, 26 N. Y. 105. He claims that defendant had notice of the restriction both from the record and from the fact that all the houses on that block were built with the set-back of seven feet. In that case all of the land affected was owned originally by one person. He divided it into lots and built houses upon them. He then proceeded to sell off the houses to various parties according to a map showing a set-back of eight feet for each house. Each purchaser was shown the map and was told that all of the houses were to be sold subject to the set-back, and each house was in fact so sold, but no mention of this restriction was made in the deeds. The court held that the restriction could be enforced in equity; that the original owner was bound in equity to use and dispose of his remaining lots, so that the assurances upon which prior purchasers bought would be fulfilled by all subsequent purchasers. It was held that this equity attached to the remaining lots. The case thus proceeds upon the assumption that there was a valid and binding agreement creating the restriction between the original owner of the various lots and his grantees. But in the case

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at bar there is no evidence of any binding agreement, parol or under seal, creating the covenant. The cases are not parallel. The fact that defendant had notice of the agreement of 1846 as recorded cannot help the plaintiff. This was not notice of a binding agreement. On the contrary, it was information that the agreement was inoperative by its own terms for lack of proper proof of three of the signatures, and was recorded improperly. From an inspection of this record the defendant surely had a right to assume that there was no binding agreement creating the easement. Bradley v. Walker, 138 N. Y. 291, 299. But if this conclusion is not warranted, if the covenant sought to be created by the instrument executed in 1846 is still operative, there is a ground upon which the court should refuse the injunction prayed for. It would appear that for the last sixty years this part of Thirty-seventh street, with few exceptions, has been used exclusively for residential purposes, the houses having a setback of seven feet. Within recent years this locality has materially changed in character. It is fast becoming a business center, with business buildings of enormous value. The avenues and streets immediately bounding Thirty-seventh street have entirely lost their residential character and have become business streets. The most valuable use to which property can be put in that neighborhood and in Thirty-seventh street itself is a business use with large business buildings. To enforce this covenant so long after its usefulness has disappeared, and to forbid the defendant to make this most valuable use of his property, would be injuring the defendant without conferring any benefit upon the plaintiff. For this reason also the injunction should be refused. Trustees of Columbia College v. Thacher, 87 N. Y. 311. There should be judgment for the defendant, dismissing plaintiff's complaint, with costs.

Judgment for defendant, dismissing the complaint, with costs.

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ALBURTHA BURGHEN et al., Plaintiffs, v. THE ERIE RAILROAD CO., Impleaded, Etc., et al., Defendants.

(Supreme Court, Erie Special Term, March, 1907.)

Parties — Plaintiffs — Joinder of plaintiffs — Who may be joined — Owners of separate lands in action to abate nuisance.
Pleading — Demurrer — Grounds of demurrer to complaint — Surplusage.

Several owners of separate parcels of land cannot unite in an action against a railroad company for damages to their respective lands from the flooding thereof by a stream whose natural flow has been impeded by the abutments of a bridge erected by the defendants; but they may unite in an action to abate the nuisance, and neither the allegations of damage nor the demand of separate money judgments render the complaint demurrable.

TRIAL of the issues of law arising on a demurrer to the complaint.

Wallace Thayer, for plaintiffs.

Adelbert Moot, for demurring defendant.

WHEELER, J. This is a demurrer by the Erie Railroad Company to the plaintiffs' complaint. The complaint alleges that the plaintiffs are the owners of various parcels or lots of real estate abutting on or adjacent to what is known as "*Smokes Creek,*" each of the plaintiffs being the owner of a separate lot or parcel which is described and designated in the complaint. The complaint then alleges that, since the plaintiffs purchased and became the owners of their several properties, the defendant railroad companies have each erected bridges over and across the creek in question, and have so constructed the abutments thereto that the natural flow of the stream has been impeded and its waters dammed back, thus flooding the lands of the plaintiffs and damaging the same.

The complaint continues and alleges that "the amount of damages which each plaintiff has suffered by reason of the overflow of his said lot, as above stated, in the years 1902, 1903, 1904 and 1905 is placed opposite the name of said

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plaintiff and the number of his said lot respectively," and then follows a tabulated list of the different plaintiffs, some eighty-four in all, the number of the lot owned by each and the amount of alleged damage to each lot.

The prayer of the complaint asks the abatement of the alleged nuisance, " and that each of said defendants be required to pay to each of said plaintiffs as the same may be apportioned and established on this trial, each of said plaintiffs' damages as established and proven, and that the plaintiffs have the costs of this action," etc.

The defendant The Erie Railroad demurs on several alleged grounds, but that particularly urged and argued is that an alleged cause of action for damages in favor of the plaintiff Albertha M. Burghen has been improperly united with an alleged cause of action for damages in favor of each of her coplaintiffs; it being contended that a recovery by way of damages in favor of each plaintiff cannot be had.

It is conceded by counsel for the demurring defendant that it is not improper for various lot owners affected by the alleged nuisance to join in an action to abate it, and this is well established by a number of well-considered cases. Strobel v. Kerr Salt Co., 164 N. Y. 323, citing Emery v. Erskine, 66 Barb. 9–14; Reid v. Gifford, Hopk. Ch. 416, 477; Murray v. Hay, 1 Barb. Ch. 59; Blunt v. Hay, 4 Sandf. Ch. 362; Brady v. Weeks, 3 Barb. 157.

In the Strobel case it is said that " while each owns a distinct piece of land situated upon a part of the stream separate from that abutted by the land of every other owner, they have a common grievance against the defendant for an injury of the same kind, inflicted at the same time, and by the same acts. The common injury, although differing in degree as to each owner, makes a common interest and warrants a common remedy."

So, too, it is held that the different defendants were properly joined as defendants in the action, as the allegation is that each has contributed toward the creation of the alleged nuisance. Warren v. Parkhurst, 186 N. Y. 45; Meyer v. Phillips, 97 id. 485. See also N. Y. C. & H. R. R. R. Co. v. Schuyler, 17 id. 592.

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We are not aware, however, that the courts have gone to the extent of holding that, in an action brought by a number situated as these plaintiffs are, they can in the same action have their separate money damages determined and awarded. It cannot be said as to the damages suffered by each that the plaintiffs have a common grievance. On the contrary, while the right to abate the nuisance is a common one, the damages of each are separate and distinct and form a question in which the other coplaintiffs have no interest and cannot be heard on the trial. Therefore claims for such damages ought not to be litigated or disposed of in an action of this character, and this seems to be the law as established by the decisions of the courts.

In Brady v. Weeks, 3 Barb. 157, an action was brought by various owners of neighboring property to abate a nuisance caused by the maintenance of a slaughter-house, and the court held it was proper to unite the owners as parties plaintiff by reason of their common interest; but the court at the same time also held that the bill was rendered multifarious by inserting therein, in addition to the prayer to restrain, a prayer that the defendants be decreed to pay the plaintiffs, respectively, the damages they had sustained by the nuisance. See also Murray v. Hay, 1 Barb. Ch. 65; Peck v. Elder, 3 Sandf. Ch. 131; Davidson v. Isham, 9 N. J. Eq. 186; Demarest v. Hardham, 34 id. 469; Rowbotham v. Jones, 47 id. 337.

I, therefore, conclude that in this action the various plaintiffs cannot recover their separate damages, but their relief is confined to the abatement of the alleged nuisance in which all have a common interest.

Assuming, therefore, that there can be no recovery of the individual damages alleged to have been sustained by the different plaintiffs, is the complaint for that reason demurrable? I think not. The allegations of the complaint that each parcel of land owned by the various plaintiffs was damaged in various amounts does not, in my judgment, necessarily amount to an allegation of a separate and distinct cause of action. These allegations may perhaps be deemed proper as showing that all the plaintiffs have a common interest in the abatement of the nuisance complained

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of and a right to a decree to that effect. At the most these additional allegations are irrelevant or redundant, and the remedy of the demurring defendant would be to strike them out under sections 545 and 546 of the Code.

Nor does the fact that the plaintiffs demand separate money judgments change the case. The prayer for relief, however broad, does not make a complaint demurrable. The court, notwithstanding the extent of the prayer, may render such relief, and no more, as the facts proven warrant.

The demurrer is, therefore, overruled with permission to the demurring defendant to answer within twenty days after service of a copy of the judgment to be entered hereon, upon payment of costs of this demurrer.

Demurrer overruled, with permission to demurring defendant to answer within twenty days, upon payment of costs of this demurrer.

ROSE M. CHUMAR, Plaintiff, *v.* EUGENE MELVIN et al., Defendants.

(Supreme Court, New York Special Term, March, 1907.)

Landlord and tenant — Re-entry and recovery of possession by landlord — Summary proceedings — Redemption.

Mortgages — Transfer of title of mortgagor — Purchase by mortgagee — Merger.

Foreclosure of mortgages on land — Foreclosure by action and sale — Right to foreclose — Acquisition of mortgagor's title except right of redemption.

Where a tenant mortgages his estate and is thereafter dispossessed for non-payment of rent, the unexpired term of his lease exceeding five years when the warrant is issued, and the mortgagee thereupon takes a new lease from the landlord for the whole of the unexpired term, she may nevertheless maintain an action to foreclose her mortgage; for the right of redemption given by section 2256 of the Code of Civil Procedure is outstanding and is not merged in the plaintiff's term.

ACTION to foreclose a mortgage.

House, Grossman & Vorhaus, for plaintiff.

John C. Shaw, for defendant Shaw.

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BLANCHARD, J. This is an action to foreclose a mortgage upon a leasehold, of which the defendant Oscar F. Shaw was owner at the time of the commencement of the action. The defendant raises two objections: *First,* that the present action is improperly prosecuted in the name of the plaintiff individually instead of the plaintiff as executrix; and *second,* that since the plaintiff obtained in September, 1906, after the defendant Shaw had been dispossessed for default in payment of rent, a new lease from the landlord for the whole unexpired period, and is now in possession thereunder, there has been a merger of the mortgagee's interest in her present term, and consequently that there is nothing to foreclose. The first point above mentioned was raised upon appeal from an order of the Special Term denying a preference in the trial of this action, and was, for the purpose of that motion, determined against the defendant. Since the complaint shows clearly that the plaintiff is suing as executrix, it seems that these objections cannot avail at this stage of the case. The second point above mentioned is untenable. According to section 2256 of the Code of Civil Procedure the defendant Shaw, the dispossessed lessee, "may, at any time within one year after the execution of the warrant, pay or tender * * * all rent in arrear. * * *. Thereupon the person making the payment or tender, shall be entitled to the possession of the demised premises." According to section 2257 the plaintiff, as mortgagee of said lessee, can redeem the premises only "If a redemption is not made by the lessee" within said period; and the plaintiff may exercise this right only "before two o'clock of the day * * * next succeeding the last day" of the lessee's period of redemption. In the present position of affairs, therefore, the defendant Shaw may at any time within the period above mentioned redeem his lease as above described and oust the plaintiff. This right now enjoyed by the defendant Shaw is outstanding and has not been merged in the plaintiff's term. It is a proper subject for the present action of foreclosure, and the motion to dismiss the complaint is, therefore, denied. Accordingly judgment is rendered for the plaintiff.

Judgment for plaintiff.

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THOMAS WILLIS, Plaintiff, *v.* ARTHUR WILEMAN et al., Defendants.

(Supreme Court, Nassau Trial Term, March, 1907.)

Limitation of actions — Revival of obligation — Acknowledgment and new promise — Nature of promise or acknowledgment.

An acknowledgment of a debt contained in a letter is sufficient to take the case out of the Statute of Limitations if the writer only recognizes the debt and admits that he is the debtor and although the letter is written after the commencement of the action.

THE complaint set forth a cause of action for goods sold and delivered.

The defendant Arthur Wileman interposed an answer oontaining a general denial and setting up as a defense the Statute of Limitations.

The action was tried before the court without a jury.

Joseph Martin, for plaintiff.

McGuire, Delany, Niper & Connolly (Arthur Wileman, of counsel), for defendant.

SCUDDER, J. Upon the trial of this action the defendant Arthur Wileman relied solely upon the defense setting up the Statute of Limitations.

The statements contained in the letters of this defendant to plaintiff constitute a sufficient acknowledgment to take the case out of the Statute of Limitations. The amount or character of the debt need not be expressed, nor is an expressed promise to pay necessary. A recognition of the debt and an admission that the writer is the debtor of the person addressed are all that are necessary. Shaw v. Lambert, 14 App. Div. 265; Fletcher v. Daniels, 52 id. 67; Cudd v. Jones, 63 Hun, 142.

In the letter of February 14, 1906, to plaintiff, defendant states "I am writing this to see if we can come to some

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understanding or arrangement in this affair. I am anxious and willing to pay you when it lies in my power. I have had some great battles to fight since I have been here and after all I have nothing that I can call my own. You have been a good friend to me and I am willing to show my appreciation. As far as I am concerned, this debt is outlawed according to law as it is over eight years since I paid you a cent, but I always say an honest debt is never out of date. * * *. I shall not fight this case for I have nothing now to fight with. It will go by default. If you take judgment it will be back of all the rest and it will be worthless."

This is a sufficient acknowledgment of the debt within the authorities above cited.

It is claimed by defendant that the letters were written after commencement of the action and that they, therefore, cannot be considered.

Plaintiff was not required to plead in his complaint facts to take the case out of the Statute of Limitations, either as a part of his cause of action or in anticipation of the setting up of that statute as a defense. Such defense must be set up by answer and cannot be raised by demurrer. See Code Civ. Pro., § 413; Sands v. St. John, 36 Barb. 628.

The acknowledgment in writing to take the case out of the statute is only a matter of evidence. See Code Civ. Pro., § 395. The fact that plaintiff acquired the instrument of evidence necessary to rebut the defense setting up the statute subsequently to the commencement of the action does not render the instrument incompetent as evidence or militate against its effect as an acknowledgment by defendant of the debt sued on.

Judgment for plaintiff.

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JOHN HURLEY, Plaintiff, *v.* JOHN F. TUCKER et al., Defendants.

(Supreme Court, New York Special Term, March, 1907.)

Mechanics' liens — Notice of lien — Sufficiency: Description of premises; Amount earned and unpaid on contract.

Where a notice of lien states the contract price, the payments already made, the sum "now earned and unpaid" and the additional amount "which will be due and owing to the claimant when the contract is completed," in such manner that by a process of addition the total amount due and owing may be ascertained; and where the notice also states in one place that the lien is claimed upon a stable standing upon lots designated by certain numbers on Perry street, in the borough of Manhattan, and in another place upon lots designated by the same numbers on Ferry street, in the same borough; the notice sufficiently complies with the requirements of the statute to create a lien for the amount thus ascertained upon the premises designated by the given numbers on Perry street in said borough.

ACTION to foreclose a mechanic's lien.

Lamont McLoughlin, for John Hurley.

Fox, Pierce & Rowe, for Wight-Easton-Townsend Co.

Benjamin F. Edsall, for Empire Brick & Supply Co.

Eustis T. Foster, for Pelham Operating Co.

Wm. F. Kimber, for John Kane.

Isidor Grayhead, for Edmund Coffin.

BLANCHARD, J. This is an action brought for the foreclosure of a mechanic's lien. Mechanics' liens are alleged to have been filed against the premises of the defendant

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Coffin, Nos. 166–172 Perry street, in chronological order by the defendant Wight-Easton-Townsend Company for $10,525.80, the plaintiff Hurley for $9,305.37, the Empire Brick & Supply Co. for $4,397.71, the defendant Morrow for $1,000, the Pelham Operating Co. for $803, the defendant Stockinger for $820, the defendant Union Construction & Waterproofing Co. for $650, the defendant John Kane & Co. for $2,059.10, the defendant Wight-Easton-Townsend Co. for $10,525.80, and the defendant Pelham Operating Co. for $386.25. The alleged lienors above mentioned were subcontractors and materialmen who furnished work and materials to John J. Tucker & Sons, the contractors of the work. The defendant Coffin sets up in his amended answer that after the abandonment of the work by the Tucker firm above mentioned he proceeded with the work through his architects and finished the construction, and now has $10,480.12 left over for distribution in this proceeding. The claim and lien of the defendant Wight-Easton-Townsend Co. for $10,525.80, being the first alleged lien filed by said company, is vigorously disputed. The notice purporting to set forth this lien states that said company "has and claims a lien for the price and value of the labor done and materials furnished, which are hereinafter mentioned, upon the stable in the course of erection located upon the lots and parcels of land in the borough of Manhattan, city, county and State of New York, known and designated as Nos. 166–172 Perry street." Thereafter it states the labor and materials and the contract price, and the payments already made, the sum "now earned and unpaid," and the amount which "will be due and owing to claimant when the contract is completed * * * in addition to the said sum," from which, by a process of addition, it may be gathered that the total amount due and owing is $10,525.80. The notice continues with this language: "That the property to be charged with a lien is described as Nos. 166–172 Ferry street, borough of Manhattan, city, county and State of New York. The amount for which lien is claimed is $1,525.80." It was held in Toop v. Smith, 181 N. Y. 283, 289, that "a mechanic's lien never comes into existence unless the notice upon

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which it is founded substantially complies with the statute which authorizes the creation of such liens. Even a court of equity has no power to breathe the breath of life into a notice of lien that is insufficient under the statute, much less a court whose function it is not to administer equity but to make the law as stable and certain as may be." In the language of the opinion just quoted "the only duty in the case at bar is to decide whether the purely statutory lien asserted by the plaintiff complies with the statute under which the notice was filed. Starting out with the principle that the statute is beneficial in character and is to be liberally construed, and that a substantial compliance with its provisions is sufficient to invest liens with validity and to give courts jurisdiction to enforce them, the first inquiry is, What does the statute require?" Section 9 of the Lien Law requires that the notice of lien shall state, among other things: "5. The amount unpaid to the lienor for such labor or materials * * *. 7. The property, subject to the lien, with a description thereof sufficient for identification, and, if in a city or village, its location by street or number, if known." The notice cannot be amplified by testimony — "by proof of what the lienor intended to express in his notice." Armstrong v. Chisolm, 100 App. Div. 440, 443. The rule was stated in Mahley v. German Bank, 174 N. Y. 499, 501, that "the provision of the statute that the law shall be construed liberally does not authorize the courts to entirely dispense with what the statute says the notice shall contain." The court will, however, construe the notice as a whole, and will disregard the ambiguities and apparent defects that are cured by the context of the instrument. Martin v. Gavigan Co., 107 App. Div. 279. Since no one appears to have been misled by the alleged defects in the notice of this lien the rules of construction above mentioned govern the present case with full force. Applying these principles to the present notice of lien it appears that a lien is demanded in the first place for an amount which, by a process of arithmetic indicated in the notice, is plainly $10,525.80, and in the second place for an amount stated to be $1,525.80. Under the rules of construction above mentioned these differ-

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ent sums must be regarded as respectively the aggregate of the items for which a lien is asked, and the sum purporting to state the total thereof, which latter sum, being obviously incorrect in respect to addition, may be corrected from the context of the instrument. The requirement as to the amount unpaid is, therefore, satisfied as regards the lien for $10,525.80. The variance in the name of the street upon which the property is situated may be similarly explained. According to the notice a single lien is claimed under a single contract upon "the stable in the course of erection located upon the lots and parcels of land in the borough of Manhattan, city, county and State of New York, known and designated as Nos. 166–172 Perry street;" and, again, upon "the property * * * described as Nos. 166–172 Ferry street, borough of Manhattan, city, county and State of New York." All the details which the statute requires relating to the lien refer to a single lien, and this single lien, according to this notice, refers with equal force to the two distinct parcels of property above mentioned. Under the rules of construction above mentioned no reason exists for construing these two descriptions as mutually destructive. Since all the requirements of the statute regarding this lien are satisfied by the notice in respect to consideration, time of performance and so forth, it is submitted that the lien is effective against so much of the property described in the notice as in fact is existent. The lien first filed by the defendant Wight-Easton-Townsend Co. is, therefore, sustained, and, according to the proof upon the trial, the defendant Pelham Operating Co. is entitled to $324 thereof and the defendant Coffin to $2,000 thereof, and the Wight-Easton-Townsend Co. or its representative to the balance thereof. The claims and liens above mentioned of the plaintiff Hurley and of the other defendants, excepting only the second lien filed by the Wight-Easton-Townsend Co., are allowed in the order of their priority stated according to the amounts proved upon the trial. The amount left over in the hands of the defendant Coffin for distribution in this proceeding is correctly determined by the evidence to be $10,480.12. The items of expense for the completion of the work and the payment made

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to the defendant Morrow do not appear to have been improperly made, and accordingly are not added to the sum above stated. Submit proposed findings of fact and conclusions of law, and judgment, upon notice.

Ordered accordingly.

FRANK FALVELLO, Plaintiff, *v.* THE CITY OF NEW YORK, JOSEPH GALLO and JOHN DITTMAR, Defendants.

(Supreme Court, New York Special Term, March, 1907.)

Mechanics' liens — Rights of subcontractors — Counterclaims.

Laborers and materialmen who perform labor and furnish materials to a subcontractor to enable him to perform his contract and who acquire a lien therefor upon the unpaid balance of the contract price for a public improvement are entitled to payment therefrom without regard to the existence of a counterclaim or offset in favor of the principal contractor against the subcontractor arising out of antecedent transactions between them.

ACTION to foreclose a mechanic's lien.

E. L. Holywell, for plaintiff.

Blandy, Mooney & Shipman, for defendant Gallo.

James Kearney, for defendant Dittmar.

NEWBURGER, J. Action to foreclose a mechanic's lien by a subcontractor. The defendant Gallo is the original contractor. He sublet to the plaintiff Falvello the rock excavation required to be done under the contract with the city. The defendant Dittmar furnished the blasting material to the plaintiff Falvello, and the other defendants were laborers employed by Falvello. The amount of the Dittmar and the laborers' liens is not disputed. It is contended, however, on the part of the defendant Gallo, that under the sixth defense of his answer whatever amount might be due from him to Falvello is offset by the amount due from Falvello to him for moneys heretofore advanced. Without passing upon the question whether the sixth defense of the defendant Gallo sets up a counterclaim or an offset I am of the opinion that

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the funds in the hands of the city due under the contract between it and Gallo are subject first to the liens of the materialman and the laborers. It has been repeatedly held that the object of the Lien Law is to protect those who enhance the value of property by furnishing labor or material to the extent of the value thereof, and that the amounts that are due from the contractor to a subcontractor are chargeable with the amounts of liens filed under the Mechanic's Lien Law and have priority over any conveyances, assignments and also over claims of general creditors. See John P. Kane Co. v. Kinney, 174 N. Y. 69; McCorkle v. Herrman, 117 id. 297; Devlin v. Mack, 2 Daly, 94. I, therefore, find that there is due the plaintiff upon the contract with the defendant Gallo the following sums: For rock excavation, 4,237 yards, amounting to $5,719.95; for earth excavation, 1,717 yards, amounting to $463.59; for filling, 4,144 yards, amounting to $372.96; for wall work, 344 yards, amounting to $430; for drilling holes, $500 — $7,486.50. There is to be deducted therefrom: Cash payments, $6,324; and for block lumber, steel and hoisting cable, $157.30 — $6,481.30; leaving a balance due plaintiff of $1,005.20, with interest. Out of the amount so found due I direct that the liens of the laboring men and of the materialman should be deducted in the order in which the liens have been filed. Costs will be allowed to the materialman, but one bill of costs only to all of the laboring men.

Ordered accordingly.

PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* GEORGE B. McCLELLAN, Defendant.

(Supreme Court, New York Special Term, March, 1907.)

Pleading — Motions relating to pleadings — Motion for judgment on the pleadings — Frivolous pleadings — Demurrer.

A motion for judgment upon a demurrer to the complaint upon the ground that the demurrer is frivolous cannot be granted where the demurrer raises a question that is doubtful.

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DEMURRER to complaint.

W. S. Jackson, Attorney-General, for People.

E. L. Richards, for defendant.

GREENBAUM, J. The complaint in this action is framed with allegations and a prayer which indicate that the Attorney-General exercised the discretion conferred upon him under section 1949 of the Code of Civil Procedure to "set forth therein the name of the person rightfully entitled to the office and the facts showing his right thereto." The effect of such a pleading would be to permit a judgment not only for ouster of the alleged usurper but a determination that the person alleged to be entitled to the office was lawfully elected to the office of mayor of the city of New York. I am not prepared to say upon an inspection of such a pleading that a demurrer upon the ground that Mr. Hearst, the person named in the complaint as the one entitled to the office, is a necessary party, is so palpably bad that it may be treated as a frivolous pleading. It is unnecessary upon a motion of this character to consider the question as to whether the demurrer is or is not well pleaded, it being sufficient to be satisfied that the legal question raised by the demurrer is doubtful. Motion for judgment denied.

Motion denied.

THE VIO CHEMICAL CO., Plaintiff, *v.* FOSTER STUDHOLME, Defendant.

(Supreme Court, Cattaraugus Trial Term, March, 1907.)

Sales — Remedies of seller — Action for price — Accrual of right of action — Conditions precedent.

Foreign corporations — Recognition, regulation and status — What is carrying on business.

Where, under the terms of an agreement for the sale of goods, the purchaser is to pay for them in thirty days, the performance of an agreement by the seller to publish certain advertisements thereof within one year is not a condition precedent to the re-

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covery by the seller of the purchase price; and, in an action therefor, the seller need not allege nor prove performance of his agreement to advertise.

A foreign corporation which has no capital employed, nor goods stored, nor branch office within this State, although soliciting and taking orders here by commercial travelers, is not doing business within this State within the meaning of the General Corporation Law.

ACTION for goods sold and delivered.

Fred L. Eaton, for plaintiff.

M. B. Jewell, for defendant.

POUND, J. The defendant, a retail dealer in drugs in the city of Olean, N. Y., and the plaintiff, an Illinois stock corporation, entered into an agreement in writing in Olean, N. Y., on the date thereof, which reads as follows:

"Town — Olean, County — Cattaraugus, State — N. Y.
"Ship by —— Date Sept. 13, 1905.
"Vio Chemical Co., Chicago, Ill.

"Please ship to us F. O. B., Chicago, the following goods, which we agree to pay for in 30 days from date of Shipment* —

"Article	Price per gross,
"3 gross Pepsoids,	$48.00
"½ " Vitaloids,	48.00
"2 " Liveroids,	24.00
" 1000 Books,	

"To run to 500 to 1000 inches of advertising in the Daily Times within one year.

"Retail Agency Agreement:—

"The Vio Chemical Co., of Chicago, Ill., hereby appoints Foster Studholme (hereafter named the Retail Dealer) one of its distributing agents, and agrees to give such Retail Dealer the exclusive advertising in the following territory, viz. Olean, for one year from this date.

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"The Vio Chemical Co. further agrees to mail 150 Pepsoids, 100 Liveroids, 50 Vitaloids orders to patients designated by the Retail Dealer on mailing list furnished by him, for an approval package of one of the above mentioned preparations, and agrees to replace all packages so obtained from Retail Dealer free of charge to him, on return of orders, reserving only the right to replace them in lots of not less than 6 packages at one time.

"The Vio Chemical Co., further agrees to give the Retail Dealer the benefit of all special advertising done in his territory which is not enumerated above.

"The Retail Dealer agrees not to sell or furnish said medicines to any person, firm or corporation in single packages at less than the retail price marked on the package, or in lots of 6 packages at one sale, and on one delivery, at the aggregate of the price of 5 single packages; provided that said Retail Dealer shall and will not at any price sell or furnish said preparations (all of which are numbered serially) to any Wholesale or Retail Dealer who is not an accredited agent of the Vio Chemical Co.

"This order is not subject to countermand, and there are no other agreements, verbal or otherwise, not expressed herein, and is to take effect upon being signed by the Retail Dealer, who has retained a duplicate hereof.

"FOSTER STUDHOLME,
"Retail Dealer.

"VIO CHEMICAL CO.,
"G. G. HITCHCOCK,
"Salesman."

The goods were delivered as ordered, but defendant failed to pay for same in thirty days from date of shipment, as provided by the contract, and plaintiff sues to recover the agreed price thereof. Defendant pleads as a defense the failure of the plaintiff to perform on its part its agreements as to advertising. Defendant neither pleads nor proves any damages sustained by him by the failure of plaintiff to advertise in accordance with the terms of the contract.

Plaintiff rests on proof of delivery of goods and defendant's

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failure to pay therefor. These facts established, the plaintiff is entitled to recover. The performance by the plaintiff of its agreement to run 500 to 1,000 inches of advertising in the *Daily Times* within one year, etc., was not and could not be a condition precedent to liability of defendant on his promise to pay for the goods within thirty days from date of shipment. Defendant's promise to pay is absolute and dependent only on the receipt of goods as ordered.

"Where a time is definitely fixed for the performance of one promise and no date assigned for the performance by the other—if A and X agree that A will buy X's property and pay for it on a certain day and no day is fixed for the conveyance by X, then X may sue for the money, in default of payment on the day named, and need not aver that he has conveyed or offered to convey the lands." Huffcut's Anson on Contract (1st Am. ed.), 362.

"Where by the terms of the contract, the time to perform the covenant on the one side is to arrive or may arrive before the time for the performance of the covenant on the other side, the former is not dependent on the latter." 9 Cyc. 642.

Plaintiff had not complied with the provisions of sections 15 and 16 of the General Corporation Law relative to foreign corporations "doing business" in this State. But soliciting and taking orders within the State by commercial travelers is not "doing business within this State" within the meaning of the act where plaintiff has no capital employed, nor goods stored, nor branch office within the State. It is, therefore, entitled to maintain this action. Penn Collieries Co. v. McKeever, 183 N. Y. 98.

The plaintiff is entitled to judgment for the amount demanded in the complaint and interest thereon from thirty days from date of shipment.

Judgment for plaintiff.

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KATHERINE P. CHAMBERLAIN, Plaintiff, *v.* STEPHEN L. SHERMAN, RICHARD E. STANLEY and FRANK COSAD, Defendants.

(Supreme Court, Wayne Equity Term, March, 1907.)

Taxes — Place of taxation — Lands in more than one district.

Where a tract of land comprising 1,335 acres beside highways and marsh lands is situated partly in each of two adjoining towns, having several dwelling houses in each town, each having an orchard, farm buildings and a tract of land that might be called a farm, in no one of which houses the owner resides, but the owner's son who manages the whole property for her lives in one of them, the others being occupied by employees and their families, and near the son's house are barns and a warehouse to which many crops are drawn from both towns as soon as harvested but horses, cattle and farm implements are kept at the different houses and used indiscriminately upon the whole tract and no fence separates the lands lying in one town from those in the other, the fact that the larger and more valuable dwelling house is occupied by the owner's son does not constitute it *the* dwelling house within the meaning of the Tax Law authorizing the assessment of a farm divided by a line between two tax districts in the district where the dwelling house or other principal buildings are located; and the provision relating to the location of other principal buildings for the purpose of controlling the place of taxation was intended to apply only to cases in which there was no dwelling house upon the tract. The present case does not, therefore, come within the exception to the general rule that land is to be assessed in the tax district where it is located.

ACTION to recover $331.30, the amount collected from plaintiff for taxes imposed by the defendants as assessors of the town of Huron, Wayne county, upon lands owned by the plaintiff in that town, for the years 1903 and 1904.

Kelly & Kelly (Edson W. Hamm, of counsel), for plaintiff.

Norton & Brown, for defendants.

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FOOTE, J. The evidence in this cause was taken at the Wayne Equity Term, and the case has since been argued and submitted upon briefs of counsel.

It involves the right of the assessors of the town of Sodus in Wayne county to subject about 575 acres of land, belonging to the plaintiff in the town of Huron, to taxation in the adjoining town of Sodus, and to collect and appropriate the tax to the use of the latter town. The plaintiff is the owner of upward of 1,300 acres of land through which the division line between the towns of Sodus and Huron runs, so that about 575 acres lie in the town of Huron and the remainder in the town of Sodus. This division line runs north and south, and plaintiff's lands adjoin it on either side for a distance of upward of one mile. By reason of certain bonded indebtedness the tax rate in Huron is greater than in Sodus.

Plaintiff's contention is that these lands constitute a farm within the intent and meaning of section 10 of the Tax Law (Laws of 1896, chap. 908), which is as follows: "If a farm or lot is divided by a line between two or more tax districts, it shall be assessed in the tax district in which the dwelling house or other principal buildings are located, in the manner provided by section nine of this chapter, the same as though such farm or lot was wholly in such tax district."

The plaintiff derived title to all these lands by inheritance from her father in 1880. Her father purchased the portion lying in the town of Sodus in 1868 from Alexander Duncan, and within a few years thereafter he acquired title to the adjoining lands in the town of Huron by purchasing from several different owners. At the time of his purchase there were several dwelling-houses and sets of farm buildings upon the tract in each of the towns. At the time of the assessments in question there were twelve dwelling-houses upon the whole tract, seven of which were situate in the town of Huron and five in the town of Sodus. The cleared land in the town of Huron is between four and five hundred acres, and in the town of Sodus about 325 acres. The rest is forest and there is also considerable marsh land and highways not

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included in the estimate of about 1,335 acres for the whole tract. Neither the plaintiff nor her father ever resided upon this tract. The plaintiff resides in the village of Lyons. In the years 1903 and 1904 and for some years prior the plaintiff's son, Frederick W. Chamberlain, managed the plaintiff's business upon this tract, and resided in one of the dwelling-houses upon the tract situate in the town of Sodus, which is the largest and most valuable of the twelve dwellings. He was employed upon a salary and had the use of this dwelling as a part of his compensation. All the other dwellings are occupied by the employees upon the tract and their families. Near the principal dwelling-house, occupied by plaintiff's son and in the town of Sodus, are barns and a warehouse, and many of the crops, after they are harvested, are drawn to and stored in these buildings from both sides of the tract. Farming operations are carried on on all the tillable land, and horses and cattle and farm implements are kept at the various barns, but at all times they are used indiscriminately upon all parts of the tract. There are orchards near most of the dwelling-houses and most of the cultivated fields are fenced, but there is no division fence separating that part of the tract in Huron from the part in Sodus. A considerable part of this division line runs through timber lands and is not in any way marked on the ground.

Prior to the year 1903, that part of the tract located in Huron had always been assessed separately in that town, and that part located in Sodus in that town, but in the year 1903, and prior to the assessment for that year, section 16 of the Tax Law was amended so as to require a farm divided by a line between two tax districts to be assessed in the district in which "the dwelling-house or other principal buildings are located." Thereupon the assessors of the town of Sodus, deeming the statute applicable, assessed the whole tract for that year and the following year, and plaintiff has paid the tax upon the whole tract to the tax collector of the town of Sodus. Nevertheless, the assessors of the town of Huron continued to assess the portion located in that town, and the tax in that town for the year 1903 not having been

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paid, it was reassessed by the board of supervisors in the year 1904 and, together with the tax for that year, included in a warrant issued to the collector for the town of Huron, who levied upon and sold certain of the plaintiff's personal property located upon this tract in that town, which was bid in for the plaintiff by her son; and, for the amount so bid, being the full amount of the tax for both years, namely, $331.30, this action is brought against the defendants, the assessors of the town of Huron.

Except for a brief period between 1872 and 1886, the statutes of this State from an early day have provided for the assessment of a farm or lot divided by a line between two tax districts as a whole in the district where the owner resides; yet few cases have arisen in the whole history of the State calling for an interpretation by the courts of the precise meaning to be given to the words "farm or lot" in these statutes, and none of the cases, either in this or other States where similar statutes exist, to which my attention has been called, are so similar as to afford a guide for the determination of this case.

The plaintiff's lands have been commonly designated in the locality as the "Shaker Tract." They are not generally referred to as a farm. Nevertheless, they are largely devoted to farm purposes and increasingly so as the timber is removed. That part located in the town of Huron is sometimes called the "Hunter Tract," a considerable part of it having been owned and in part cleared and cultivated by a man named Hunter, who built and occupied the principal dwelling on that part of the tract. It would not, perhaps, be improper to designate this whole Shaker Tract as a farm, and yet, with equal accuracy, each section of the tract on which is located a separate dwelling-house and farm buildings and orchard may be called a separate farm. It is clear that the number of acres contained in the whole tract is not controlling upon the question as to whether it constitutes one or more farms; and, so long as it is all held in one ownership and operated together by the owner, I think it may be fairly said to constitute a farm within the intent and meaning of the statute.

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The general intent of the statutes for taxation is that all lands shall be assessed in the tax district in which they are located; but section 10 undertakes to create an exception to this rule as regards a farm or lot divided by a line between two or more tax districts by requiring the same to be assessed in the district "in which the dwelling house or other principal buildings are located." To bring the plaintiff's farm within this exception, it must appear that "the dwelling house or other principal buildings" for the whole tract are located in one of these two tax districts; otherwise, section 10 does not apply, and the general rule must prevail that the lands are to be assessed in the district where they are located.

The plaintiff's contention is that, because the larger and more valuable dwelling-house is located in Sodus and is occupied by the plaintiff's son, who is her agent to manage the whole tract, therefore it must be held to be "the" dwelling-house within the meaning of the statute. It is not claimed that this particular dwelling-house was ever occupied by the plaintiff or by her father or by any previous owner who owned any of the lands located in the town of Huron. On the other hand, the Hunter house, so called, of nearly equal size and value, was erected and used as "the" dwelling-house for that part of the lands located in Huron at the time the ownership of the two parts was separate. It is quite probable that, if the plaintiff herself occupied any one of the twelve dwellings upon this tract, it would be deemed "the" dwelling-house within the intent and meaning of this statute; and, where there are several dwellings upon a farm, it is at least doubtful whether there is or can be any "the dwelling" except the one occupied by the owner. Each of the twelve dwellings upon this tract is occupied by an employee of the plaintiff. None of them pay rent to the plaintiff, but they occupy as servants of the plaintiff as an incident to their employment. None of them have any such possession as constitutes occupancy within the intent of the tax laws, or such as would entitle them to maintain an action for trespass. Does the circumstance that the plaintiff's son is her principal agent, having author-

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ity over her other agents upon the tract, make the dwelling which he occupies "the" dwelling named in the statute? If the statute had named the *principal* dwelling, its identity could be determined by ascertaining which is the larger and more valuable structure; but no such intent appears in the statute, and it seems more probable that the intent of the Legislature was to designate as "the" dwelling the one occupied by the owner of the farm, or at least one erected and intended for the owner's occupancy as distinguished from houses erected and intended for tenants and employees, and in this view the Hunter house may as properly be called "the" dwelling as the one occupied by the plaintiff's son.

Furthermore, this statute must receive such a construction as will make it practicable for the assessors to discharge their duty under it and one which will not permit the owner to change the place of taxation of the whole 1,335 acres from one town to the other from year to year through caprice or to take advantage of a lower rate of taxation, simply by having her principal employee or superintendent on the tract change his place of residence from one dwelling-house on the tract to another in the other town. To make section 10 of the statute applicable to this tract, the assessors of each town must have some means of determining which is "the" dwelling when they go to assess the property. They make the assessment at their peril, and are personally liable for assessing lands in the wrong district. The law-makers cannot have intended the statute to apply to a case like this, where, the owner not residing upon the tract, the assessors will be left to speculate as to which of twelve dwellings is "the" dwelling contemplated by the statute, or to determine that "the" dwelling is necessarily the larger building or the one occupied by the principal one of twelve agents of the owner, all residing in different dwellings upon the tract.

I am of the opinion, therefore, that there is no "the" dwelling upon this tract within the intent and meaning of section 10 of the Tax Law.

But the plaintiff contends that if "the" dwelling is not

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located in the town of Sodus, the "other principal buildings" are so located, and that this circumstance requires the whole tract to be assessed in Sodus. This contention is based on the construction which the plaintiff's counsel gives to section 10, to the effect that the location of "the" dwelling-house in Sodus, or, if there is no "the dwelling house," then the location of the "other principal buildings" in Sodus requires the assessment of the whole tract in Sodus. The phrase "shall be assessed in the tax district in which the dwelling house or other principal buildings are located" admits of more than one construction as to its meaning. It was brought into the statute by the amendment of 1903. The previous statute required the farm to be assessed in the tax district where the owner or occupant resided. There appears to have been no judicial construction of the statute in its present form. In the great majority of cases, a farm has upon it but one dwelling-house. No doubt the intention was to continue the rule of the former statute, namely, that the farm should be assessed in the tax district where the owner or occupant resides, but also to provide for cases where the owner or occupant, in a legal sense, did not occupy the dwelling-house or reside in the tax district, and also for cases of occupied and cultivated farms having no dwelling-house but having other farm buildings. This seems to have been the intent of the amendment, though it must be confessed that it is not as clearly expressed as it should have been.

Assuming this to be the intent of the statute, it follows that, where there is a dwelling-house, its location must control the place of taxation, irrespective of the location of the other principal buildings, and that it is only in case there is no dwelling-house that the location of the other principal buildings becomes material.

There is nothing in the evidence from which a finding can be made that any of the buildings located in the town of Sodus are the principal buildings of the tract. There is a storehouse there in which many crops are stored from all parts of the tract and barns and other buildings; but there are a greater number of buildings in the town of Huron part

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of the tract, including a sawmill and a fruit evaporator and a boarding-house. There is nothing in the evidence which would justify the assessors of the town of Sodus in determining that the "principal buildings" of the tract are located exclusively in that town.

Accordingly, it must be held that this tract of land does not fall within the exception specified in section 10 of the Tax Law and, hence, that each part of the tract should be assessed in the tax district where it is located.

The plaintiff's complaint must be dismissed, with costs.

Complaint dismissed, with costs.

GEORGE E. CRAFT, Plaintiff, *v.* ORSAMUS B. LENT et al., Highway Commissioners, Defendants.

(Supreme Court, Westchester Trial Term, March, 1907.)

Municipal corporations — Remedies of taxpayers and corporators — Right of taxpayer to interfere in corporate management — Only in case of lack of power or fraud.

A taxpayer's action, brought under L. 1881, ch. 531, as amended in 1892, to restrain and obtain redress for unlawful official acts of public officers is only authorized where the acts complained of are without power or where corruption, fraud or bad faith amounting to fraud is charged.

A board of town highway commissioners, about to grant a franchise to conduct a public lighting service, in an honest exercise of discretion after a public hearing has been given to taxpayers and citizens, may refuse to accept money for such franchise and grant it to a corporation without receiving compensation; and their action is not reviewable by the courts.

Where the complaint in such an action against said board does not allege and the proof does not show fraud or corruption or acts of bad faith amounting to fraud in granting the franchise, though it appears that, at the meeting at which the board were about to grant the franchise, an individual offered to pay $1,000 for it and tendered the money, the complaint will be dismissed at the trial, but without costs.

ACTION by a taxpayer to restrain the highway commissioners of the town of Cortlandt, Westchester county, N. Y.,

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from granting a franchise for conducting a public lighting service upon highways of said town.

Eugene B. Travis (H. R. Barrett, of counsel), for plaintiff.

Nathan P. Bushnell (Stephen Lent, of counsel), for defendants.

MORSCHAUSER, J. The plaintiff, a taxpayer of the town of Cortlandt, Westchester county, N. Y., commenced this action, pursuant to chapter 301 of the Laws of 1892, amending chapter 531 of the Laws of 1881, to restrain the defendants, the highway commissioners of the town of Cortlandt, from granting a franchise to any person or corporation for the right to conduct a public lighting service upon all the highways in the town of Cortlandt, outside of the incorporated villages, except that the same shall be done upon a public hearing to the highest bidder or to persons or corporations that shall offer to pay a consideration or the highest price for said public right and privilege.

The complaint sets forth the usual allegations that the plaintiff is a citizen and taxpayer, and that the defendants are highway commissioners in the said town, which town is a municipal corporation; and that it is the duty of the highway commissioners to represent the town and protect the town in its rights and interests; and also that a corporation known as the Oakland Electric Light & Gas Company filed an application for a franchise to furnish electric light and heat in the said town; and that, after the application was made and notice was published in the newspapers and at the hearing, one John V. Alexander objected and protested against the granting of the franchise; and that he, Alexander, was willing to pay $1,000 therefor; and it is further alleged that, notwithstanding the offer of the said Alexander and ignoring and disregarding the protest of said Alexander, the said highway commissioners made and resolved to grant the application for the franchise to the said Oakland Electric Light & Gas Company.

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The plaintiff also alleges that the town of Cortlandt is one of the wealthiest towns in Westchester county, and that the giving away of the franchise without a consideration was a great injury to the taxpayers.

The plaintiff also alleges that the Oakland Electric Light & Gas Company is a corporation capitalized to the extent of $50,000; that its only corporation property consists of a small parcel of land having a small water power in the town of Cortlandt; that it has an insufficient plant to operate a public service corporation, and that it was assessed upon the tax-roll at $3,000.

With the admission of the formal allegations of incorporation and the acts of the highway commissioners at their meeting, the answer of the defendants puts in issue several of the allegations contained in the complaint. The answer also contains several alleged defenses.

I have grave doubts as to whether the complaint contains facts sufficient to constitute a cause of action.

There is no fraud or corruption charged against the defendants, nor is there alleged sufficient acts of bad faith amounting to fraud. Kittinger v. Buffalo Traction Co., 160 N. Y. 377; Barhite v. Home Telephone Co., 50 App. Div. 25.

The provisions of the statute (Laws of 1892, chap. 301) only authorize actions by taxpayers where the acts complained of are without power, or where corruption, fraud or bad faith amounting to fraud is charged. Adamson v. Nassau Elec. R. Co., 89 Hun, 261; Talcott v. City of Buffalo, 125 N. Y. 281; Erie R. R. Co. v. City of Buffalo, 89 N. Y. Supp. 122; 96 App. Div. 458; Zeigler v. Chapin, 126 N. Y. 349; Weston v. City of Syracuse, 158 id. 274; Kittinger v. Buffalo Traction Co., 160 id. 377.

Upon the trial it was not proven that the defendants were guilty of fraud or collusion or committed any overt or unlawful acts. The only claim made by plaintiff was that the acts of the defendants were of such bad faith as to amount to a fraud.

The proof presented on the trial was that the board, at a meeting, was about to grant a franchise to a corporation,

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when one Alexander offered to pay $1,000 for such franchise; and I have no doubt the offer so made was in good faith; at least, a good tender was made.

The defendants did not see fit to accept the offer of the said Alexander, and this action was commenced. The court is asked to say to the highway commissioners that they were wrong in not accepting the amount so offered. It may be that the defendants are making a mistake and it may be an error of judgment on their part to refuse to accept money for a franchise where they are about to grant a franchise to a corporation without receiving any compensation for the town. Still, the board has this discretion, and I do not think that a court has a right to interfere in such discretion, if honestly exercised. It may be that the acceptance of the $1,000 for the franchise would in the end prove an injury instead of a benefit to the town. It may also be that it would be of greater advantage to the town to award the franchise to a corporation without any compensation than to one who is willing to pay therefor. These are all matters for the board to determine in the exercise of sound discretion. If there were any corruption or fraud or acts of bad faith amounting to a fraud proven upon the trial, the court might well interfere to grant the relief prayed for, but such proof has not been shown. The defendants are by statute the sole persons to determine the question of the granting of a franchise; and their decision, in the absence of proof of fraud, cannot be interfered with by the courts. Ellision v. Allen, 30 N. Y. Supp. 442; 2 High Inj., § 1311.

Mr. Justice Comstock, in Davis v. Mayor, 14 N. Y. 532, in the matter involving the discretion vested in a local body of a similar nature, says: "Courts are certainly not wiser on this subject than the common council * * * and unfortunately for their right to interfere, the supreme law-making power of the state has vested in the council, and not in them, the power to regulate and control the streets of the city."

In the case of Barhite v. Home Telephone Co., 50 App. Div. 28, Mr. Justice Spring says: "The common council of the city is its legislative body, and within its sphere of

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action its legislative cognizance is supreme and cannot be fettered or obstructed by judicial interference." Citing Kittinger v. Buffalo Traction Co., 160 N. Y. 377; People ex rel. Sturgis v. Fallon, 152 id. 1, 11.

The presumption is that no official person, acting under oath of office, will do aught against his official duty, or will omit to do aught which his official duty requires to be done. Mandeville v. Reynolds, 68 N. Y. 528.

"If courts, even in a case of palpable fraud, possess the power to interfere and restrict a body executing its legislative authority within its prescribed compass, that power will be exercised only in an extraordinary case, and when public policy imperatively requires it. If the courts, on every general charge of fraudulent, collusive conduct against the members of a municipal body with delegated legislative power, should intervene to restrain the execution of its normal duties thus delegated, the clashing between the two co-ordinate branches would be fraught with immeasurable harm. The policy of our Constitution is to keep these two branches distinct, each to be supreme in its own domain, and transgression upon the province of one would invite a like trespass upon the other until the barriers separating the two would be wholly removed." Barhite v. Home Telephone Co., 50 App. Div. 29.

"The legislature could not have intended that the courts should supply intelligence and prudence to incapable officials at the demand of taxpayers, but manifestly did intend to give the latter protection against the dishonesty or fraud of the municipal agent." Zeigler v. Chapin, 126 N. Y. 349.

"Restraints on the legislative power of control must be found in the constitution of the state, or they must rest alone in the legislative discretion. If the legislative action in these cases operates injuriously to the municipalities or to individuals, the remedy is not with the courts. The courts have no power to interfere, and the people must be looked to, to right through the ballot-box all these wrongs." Cooley Const. Lim. (6th ed.) 229.

It will be observed by examining the foregoing authorities that the courts have no right to interfere with municipal

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bodies when the discretion of such municipal bodies is to be exercised, and when no fraud or corruption, or bad faith amounting to fraud, has been charged or proven. In view of the public feeling now existing in this locality, the defendants may well exercise their discretion with caution and deliberation and after a public hearing has been given to taxpayers and citizens. Because the defendants are public officials, the public has a right to demand and expect from them the exercise of their best judgment after mature deliberation.

The complaint is dismissed; no costs.

Complaint dismissed; no costs.

HARRY FELLER et al., Plaintiffs, *v.* H. RAYMOND MITCHELL, Defendant.

(Supreme Court, New York Special Term, March, 1907.)

Vendor and purchaser — Title and incumbrances — Title derived through guardian.

Infants — Property and conveyances — Sale, mortgage or lease under order of the court — Title and rights of purchaser, etc.

Where the mother and surviving parent of an infant who had an interest in certain real estate acquired the title thereto a few days after it had been sold, under an order in a proceeding to sell the infant's real estate instituted upon the petition of the mother, the circumstances are sufficient to create a reasonable doubt as to the good faith of the proceeding and as to the marketability of the title, and the vendees, under a contract of sale with the mother as owner, are entitled to recover back their deposit and the expenses incurred in the examination of the title.

ACTION by vendees to recover back deposit paid on purchase of land, and the expense of an examination of the title.

Arthur Knox, for plaintiffs.

Harold Swain, for defendant.

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NEWBURGER, J. This is an action brought by plaintiffs, as vendees, to recover back the amount paid by them as a deposit and also to recover the amount of counsel fees and disbursements, being the expenses of examining the title. By stipulation, the only question submitted to the court arises in connection with an infant's proceeding. In 1889, Katharine P. Williams, the mother of Annie P. Nicholson, an infant, who had an interest in the premises as petitioner, instituted proceedings in the Court of Common Pleas for leave to sell the infant's share of the property. One Charles E. Clarke was appointed special guardian, and thereafter proceedings were had which resulted in an order authorizing the sale of the infant's interest to Percy E. Clarke. Clarke, the guardian, and Clarke, the purchaser, as appears from an examination of the proceedings, were both residents of the city of Washington. The deed from the special guardian to Percy E. Clarke is dated on July 11, 1889, and on the 30th day of July, 1889, Percy E. Clarke conveyed the same premises to Katharine P. Williams, the mother of the infant and the petitioner in the infant's proceedings. Section 50 of the Domestic Relations Law provides that the mother, if there be no father, shall be the guardian in socage, and section 53 fixes the powers and duties of such guardian. In Davoue v. Fanning, 2 Johns. Ch. 252, it was held that: "If a trustee or person acting for others sells the trust estate and becomes himself interested in the purchase, the *cestui que trusts* are entitled, as, of course, to have the purchase set aside and the property re-exposed to sale under the direction of the court. And it makes no difference in the application of the rule that a sale was at public auction *bona fide,* and for a fair price, and that the executor did not purchase for himself, but a third person, by previous arrangement, became the purchaser, to hold in trust for the separate use and benefit of the wife of the executor, who was one of the *cestui que trusts* and had an interest in the land under the will of the testator." See also People v. Open Board of Brokers, 92 N. Y. 98. In Terwilliger v. Brown, 44 N. Y. 240, Mr. Justice Earl says: "The law exacts scrupulous good faith on the part of him who acts as

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trustee for another, or holds any other fiduciary relation to another. A trustee is not permitted to purchase the trust property, or be directly or indirectly interested in such purchase. He is not permitted to make the purchase as agent for another, or through an agent for himself. And it matters not if he pays all the property is worth, nor if the sale is advantageous to the *cestui que trust.* It is a matter of course for courts of equity to set the sale aside upon the application of the *cestui que trust.* The object of the rule is to afford the *cestui que trust* the most ample protection against fraud and injustice, and to remove out of the way of the trustee all inducements and temptations to speculate upon the trust property, or to manage and manipulate the same for his own benefit." It was, therefore, not incumbent upon the plaintiffs to allege fraud in the conveyance of the infant's interest to her mother. The examination of the infant's proceedings was sufficient to cast suspicion upon and create a reasonable doubt as to the good faith of the proceedings and thereby create a doubt as to the market value of the title. Judgment for the plaintiffs, with costs. Submit findings.

JOSEPH LIEBMANN, as Sole Surviving Acting Executor and Trustee Under the Last Will and Testament of JOSEPH LIEBMANN, Deceased, Plaintiff, *v.* HENRY LEOPOLD LIEBMANN et al., Defendants.

(Supreme Court, New York Special Term, March, 1907.)

Wills—Interpretation and construction: General rules—Subordination of language to intent; Designations and descriptions of property, funds, etc.—Particular terms of doubtful meaning—Corporate stock as including interest in mortgage.

Suspension of power of alienation—Validity of particular future estates—Suspension within the limitation.

Where the intention of a testator appears clear, but his plan and definite purposes are endangered by inapt and incorrect modes of expression, the court should subordinate the language to the intention; and to get at the correct meaning it may reject words or limitations, supply or transpose them.

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About two weeks after the execution of his will testator died, owning 149 shares of corporate stock in a brewery of the par value of $1,000 each, and left him surviving his widow, who died ten years thereafter, a son and four married daughters. The will directed that as to twenty-one shares the son should receive the net income thereof during the life of the widow and that as to the remaining shares she should receive the income thereof during her life; that after her decease forty-five of the shares should go to the son absolutely and that the trustee should continue to hold the remaining shares in trust for ten years from "my decease" but in no event beyond the lifetime of the son, and "during the said period" the income on twenty-six shares should be paid to each of his daughters or in the event of their death to their lawful issue. The will further provided that the son should have the right, at or within one year after the expiration of "said ten years," to purchase the entire amount of stock set apart for the benefit of testator's daughters at par value. It further provided that, if the son should fail to exercise the option within one year after the expiration of the ten-year period, the stock set apart for the daughters should "belong to and be delivered to each of them at the expiration of said period of eleven years or upon the decease of my son, absolutely and as their own property, without any restriction whatever." Held, that the plain purpose of the testator was to give his widow during life all the income except what was to go to the son, and for ten years after her death to give the daughters or their issue the income on twenty-six shares each, and that the 104 shares might then be transferred at par to the son who would, in the meanwhile and subsequently to his mother's death, absolutely own forty-five shares in his own right; and that, as said provisions were inconsistent and conflicting only on the assumption that the testator meant "my decease" and not "her decease," all ambiguities would be eliminated and effect given to the design of the testator by substituting "her" for "my"; and that the son's option could not be exercised until ten years after his mother's death.

It appearing that, previous to the incorporation of the brewing company, the parties conducted the same business as copartners and a bond and mortgage of $150,000 was given in part payment for the transfer to the corporation of the copartnership property it was clear that the testator regarded his interest in said bond and mortgage as a mere incident to his stock; that they were inseparable, and that his disposition thereof was intended to embrace a pro rata interest in his one-half of the bond and mortgage.

There being but two lives specified, the lives of the mother and son, during which the absolute ownership of the property was suspended, the Statute against Perpetuities had not been offended.

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ACTION for the construction of a will and codicil.

Eugene G. Kremer, for plaintiff.

Samuel Hoff, for defendants Furst.

Mandelbaum Bros., for guardian *ad litem*.

Guggenheimer, Untermyer & Marshall, for defendant Liebmann.

O'GORMAN, J. Action for the construction of the will and codicil of Joseph Liebmann, deceased. The testator died on April 5, 1895, about two weeks after the execution of the will and codicil. He was fifty-six years of age at the time of his death. He was survived by his widow, then in her sixty-second year, his son, Henry, twenty-three years old, and four daughters, all of whom, excepting an incompetent, were married. The widow died on October 22, 1904, about ten years after her husband's decease. At the time of the execution of the will the corporation of Obermeyer & Liebmann, brewers, had outstanding 300 shares of stock of the par value of $1,000 each. Of these 149 shares belonged to the testator, 149 shares were held by the Obermeyer family, and two shares, representing the balance of power, were held in trust. As to 21 of the 149 shares owned by the testator the will provided that his son should have the income thereof during the life of his mother; that as to the remainder of the shares (128) the mother should receive the income during her life; that upon her death the son was to receive absolutely the 21 shares above referred to and 24 additional shares, so that he should then be possessed of 45 shares, being approximately thirty per cent. of the entire interest of the testator in the corporation of Obermeyer & Liebmann, which constituted the bulk of testator's estate. As to the remaining 104 shares the will confers an option upon the son to purchase the same at par at the expiration of ten years. Whether this period runs from the death of testator or from the death of his wife is the principal question to be determined in this action. The stock is valuable and earns an income from twenty to thirty per cent. annually. The

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question arises under paragraph 8 of the will, which reads as follows: "Eighth. I give and bequeath unto my said executors and trustees or to such of them as shall qualify, the survivors and last survivor of them, all of the shares of stock which shall be owned by me in my individual right at the time of my decease in the corporation of 'Obermeyer & Liebmann.' In trust, however, to collect and receive the income and dividends therefrom, and to pay over the same as to twenty-one shares of said stock to my son, Henry Leopold Liebmann, during the lifetime of my wife, Fanny Liebmann, and to pay over the dividend and income from the remaining of said shares of stock to my wife, Fanny Liebmann, during the term of her natural life, and after her decease to deliver said twenty-one shares of stock to my said son, Henry Leopold Liebmann, to have and to hold the same absolutely and without restriction, and as to the remaining of said shares of stock to continue to hold the same for the period of ten years from the time of my decease, but in no event beyond the lifetime of my said son, Henry Leopold Liebmann, and during the said period to pay over the dividends and income on twenty-six shares of said stock to each of my daughters Betty Furst, Clara Rosenfeld, Sarah Cohn and Lilly Gutman. If any of them shall die before the expiration of the said period of ten years, and prior to the decease of my said son, Henry Leopold Liebmann, and before receiving the shares hereinbefore set apart for her benefit, the shares of the one so dying shall go to her issue in equal shares; and if there shall be no issue, to the survivors or survivor of all my children, in equal shares, excepting my daughter Martha. This bequest of said shares of stock for the benefit of my daughters is made expressly subject to and upon the condition that my said son, Henry Leopold Liebmann, shall have the right at or after the expiration of the said ten years, during which term the said stock shall be held in trust, but in no event beyond the lifetime of my said son, to purchase the entire amount of stock so set apart for the benefit of my daughters at the par value thereof. But in the event that he shall fail to exercise the said right within one year after the expiration of said ten

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years the said shares of stock so set apart for my said daughters shall belong to and be delivered to each of them at the expiration of said period of eleven years or upon the decease of my said son, absolutely and as their own property, without any restriction whatsoever. And in the event that any of said daughters, excepting my daughter Martha, shall die before the decease of my said son, and before the expiration of the said eleven-year period, and prior to the exercise of the right to purchase herein given to my said son, leaving lawful issue her surviving, the dividends and income from the shares of stock so held for the benefit of the daughter so dying shall be paid and applied by my said executors and trustees to the support, maintenance and education of the child or children of such deceased daughter or daughters. The bequest of the said shares of stock of the said corporation made to my said executors and trustees is upon the further trust that they shall, after the death of my wife, in addition to the twenty-one shares of stock hereinabove given to my said son, Henry Leopold Liebmann, deliver to and I hereby give and bequeath unto my said son, Henry Leopold, or to his issue, in equal shares, in the event of his death before receiving the same, twenty-four shares of said stock, so that my said son, Henry Leopold, shall have and receive in all forty-five shares of the said stock as his own property absolutely. And if he shall die leaving no lawful issue that the said forty-five shares of stock shall be equally divided between all of my surviving children excepting my daughter Martha. In the event that I shall, prior to my decease, transfer to my said son, Henry Leopold, any of my shares of stock of said corporation, the number of shares so transferred by me to him shall be deducted from the said forty-five shares of stock which it is my intention he shall receive. If I should become the owner of any shares of stock of said corporation in addition to those hereinabove bequeathed I give and bequeath such additional shares to the same persons and in the same proportions as is above provided as to the disposition of the shares of stock owned by me at the time of the making of this my will. I direct that for the purpose of ascertaining the income or

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dividends upon the whole or any part of the said shares of stock all moneys drawn as salary by any one or more persons representing my holdings of said stock in said corporation or as interest upon my shares of said one hundred and fifty thousand dollars mortgage, shall be regarded as profits and shall be paid over as income or dividends upon said stock, under the terms of this my will." It is apparent that if the expression "my decease" is held to correctly express the intention of the testator, it is difficult if not impossible to reconcile many of the testamentary provisions. It will be observed that the testator first directs that as to twenty-one shares the son shall receive the income thereof during the life of his widow, and that as to the remaining one hundred and twenty-eight shares the widow shall receive the income thereof during her life; that after her decease the twenty-one shares and twenty-four additional shares shall pass to the son absolutely, and as to the remaining shares the trustees shall continue to hold the same in trust for ten years from "my decease," but in no event beyond the lifetime of the son, and "during the said period" the income on twenty-six shares shall be paid to each of his daughters, or in the event of their death to their lawful issue. This clearly imposes an impossibility upon the trustees, as it requires them to pay the same income to the widow for life, and to the daughters "during the said period" of ten years from the testator's death. The testator further provides that the son shall have the right at or within one year after the expiration of the "said ten years" to purchase the entire amount of stock so set apart for the benefit of his daughters at the par value thereof. The widow lived nine and one-half years after the testator. If she had survived the ten-year period and the son had exercised his option, then the estate of the widow would be cut off and that of the daughters destroyed. There is a further provision that if the son fail to exercise the option within one year after the expiration of the ten-year period the stock set apart for his daughters "shall belong to and be delivered to each of them at the expiration of eleven years or upon the decease of my son, absolutely and as their own property, without any re-

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striction whatever." Under this provision, if the son died during the period of ten years from the testator's death, or, if alive, failed to exercise his option before the expiration of eleven years, the stock would go to the daughters absolutely, with the right of immediate possession, although the testator previously directed that the trustees should hold the same in trust to receive the income, and except as to the twenty-one shares to pay the same to his wife during her life. All of these provisions and others to which reference might be made are inconsistent and conflicting only on the assumption that the testator meant "my decease" and not "her decease" in the paragraph of the will above quoted. By substituting "her" for "my" so that the instrument will read "for the period of ten years from the time of her decease," all the ambiguities are eliminated and effect is given to what, from the entire instrument, appears to be the design of the testator. His purpose, plainly evinced, was to give to his widow during her life all the income except the income on twenty-one shares, which was to go to the son; that for a period of ten years after her death the daughters or their issue were to receive the income on twenty-six shares each, and that at the end of this ten-year period the one hundred and four shares were to be transferred at par to the son, who, in the meanwhile and subsequent to his mother's death, would absolutely own forty-five shares in his own right. To hold otherwise would be to practically disinherit the daughters, and there is no reason to believe that the testator intended to do so. If the strict construction urged on behalf of the son were adopted it would result in almost wholly depriving the daughters of the testator or their issue of any share in the large earning capacity of the business in which the testator had a half interest. For nine and one-half years the mother and son received the entire income. For a few months thereafter the daughters or their issue shared in the profits, whereupon the son attempted to terminate their enjoyment of the income by asserting his claim to the one hundred and four shares at par. Where, upon examination of a will taken as a whole, the intention of the testator appears clear, but its plan and

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definite purposes are endangered by inapt or incorrect modes of expression, the court may and it is its duty to subordinate the language to the intention. It may reject words or limitations, supply or transpose them to get at the correct meaning. Phillips v. Davies, 92 N. Y. 190; Horton v. Cantwell, 108 id. 255; Roe v. Vingut, 117 id. 201. It is evident from the context of the will that the wrong word has been used, and that the real intention of the testator will be defeated unless "her" be substituted for "my." To prevent such a result and to effectuate the testamentary design, the provision under consideration should read: "To hold the same for the period of ten years from the time of her decease." I conclude, therefore, that the limitation set forth in the eighth paragraph of the will is based on the death of the widow and not on the death of the testator. It follows that the son's option cannot be exercised until ten years after his mother's death. Notwithstanding the employment of inapt language in reference to the $150,000 bond and mortgage in which the testator had a half interest, there is no room to doubt his intention as gathered from the entire will and codicil. Previous to the incorporation of Obermeyer & Liebmann the parties conducted the same business as copartners, and this bond and mortgage was given to them in part payment for the transfer of copartnership property to the corporation, which they organized and all the stock of which they held. It is clear that the testator regarded his interest in the bond and mortgage as a mere incident of his stock; that they were inseparable, and that his disposition of the shares of stock was intended to embrace their *pro rata* interest in his half of the bond and mortgage. The Statute against Perpetuities has not been offended. There are but two lives specified — the mother and the son — during which the absolute ownership of the property is suspended, and where the trust term is well limited the income may be given to any number of beneficiaries or *cestuis que trustent,* whether persons *in esse* or not *in esse.* The lives may be any lives, whether those of beneficiaries or not. Crooke v. County of Kings, 97 N. Y. 421; Bailey v. Bailey, 97 id. 460. Judgment accordingly.

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DORUS C. BASCOM and HERBERT WHEELER, as Executors and Trustees Under the Last Will and Testament of GEORGE C. WEED, Deceased, and the said HERBERT WHEELER, Individually, Plaintiffs, *v.* JOHN S. WEED, ALFRED T. WEED, and PHILIP T. WEED, Individually and as Executors of and Trustees Under the Last Will and Testament of the said GEORGE C. WEED, Deceased, ANNIE WHEELER, CHARLES A. WHEELER, GEORGE WHEELER, JOSEPH T. WEED, GEORGE C. WEED, SARAH J. WEED, CARRIE BLANCHE WEED, RACHEL K. WEED and FREDERICK M. WEED, Defendants.

(Supreme Court, Essex Trial Term, March, 1907.)

Wills—Interpretation and construction: Terms defining the nature and quality of estates or interests — Future interests and vesting, etc. — Direction to convey, deliver, transfer or pay over to beneficiary at future time, Estates subject to powers; Administration of estate and execution of powers and trusts, etc.— Particular terms of doubtful meaning — Majority authorized.

Trusts: The trustee, appointment, etc.—Appointment by the court — On insanity of trustee; Execution and administration of trust — Nature of trustee's title and establishment of estate — Title vested in trustee.

Suspension of power of alienation — Effect of separability of estates — Separate trusts for more than two lives.

Conversion (equitable) — How and in what cases effected — Implication.

The provision of the Real Property Law (L. 1896, ch. 547, § 49) that all expectant estates are descendible, devisable and alienable in the same manner as estates in possession does not prevent a testator from making an expectant estate subject to be defeated by the exercise of a power of sale given to trustees to be exercised before the owner of the expectant estates becomes vested with the absolute title.

No rule of law prevents a testator from empowering trustees to act by a majority of their number.

Where one of five trustees becomes a lunatic, the remaining trustees cannot act as the survivors might do in case of the death of one of their number, but it is the duty of the lunatic's co-trustees to apply for his removal and for the appointment of another in his stead.

After a devise and bequest of testator's residuary estate to five executors, or the majority of them, in trust for specific uses and

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purposes during the lives of testator's four children, with a discretionary power of sale, the will provided:

"I will and direct that the net income of one other fourth part and share of my estate be paid annually (or oftener in the discretion of my executors and trustees) by my said executors and trustees, to my son, * * * so long as he shall live for his support and maintenance.

"Upon the death of my said son * * * they shall pay over the said one-fourth part of my estate to the lawful children of the body of said * * * then surviving, and to the children or descendants of any deceased child of him then surviving, share and share alike, to their own use forever, the children or descendants of any such deceased child, however, to together take only what their parent would have taken if living at the death of said * * *. Should any of said beneficiaries be infants at that time, then their portion shall be paid to them as and when they shall severally reach the age of 21 years, the income meantime to go to their support severally.

"In case my said son * * * shall die leaving no child of his body nor any descendants of any such child him surviving, then I give, devise, and bequeath the said one-fourth share of my estate (the income of which is hereinbefore devised for his support) unto my other children surviving at his decease and to the children or descendants of any child of mine then deceased, share and share alike, to their own use and benefit, the children or descendants of any such deceased child, however, to take together only the portion which their parent would have taken, if living at the death of said * * *. Should any of such beneficiaries be minors, then their portions shall be paid to them severally on their severally reaching the age of 21 years, the income meantime to go to the support of such minors severally."

A separate clause for each of the other children made substantially the same directions, but by a variety of expression. In an action brought for the construction of the will, upon the death of the only daughter, and to determine the claims of her children to their share in the estate, held:

The title to the trust estate did not vest in the legatees and devisees upon the death of testator but the members of each class took a future contingent estate in the property of the particular share subject to be defeated by death before the death of the life beneficiary, and, also, subject to the exercise of the power of sale by the trustees.

Four separate and distinct trusts were created, each for the period of one life in being, and there was no unlawful suspension of the power of alienation.

The provision that the trustees, if any of the grandchildren were minors at the time of the falling in of the life estate, were required

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to hold possession of the shares of such minors during their minorities, respectively, did not prevent the vesting of the title in them immediately upon the death of the life beneficiary, the enjoyment of which was postponed until their majority.

The devise to the trustees and the power of sale were limited to the purposes of each trust, and such power, if exercised in respect to any one trust, was required to be exercised before the termination of such trust by the death of the life beneficiary, as the property of each trust thereupon became vested in the persons belonging to the class named in the devise; and the trustees were not vested with an absolute title to the estate.

There was no equitable conversion of the real property into personalty by the terms of the will, and the use of the words "pay over", in each of the clauses which provided for the passing of each trust estate to the children of the life beneficiary, does not necessitate a construction to the effect that the trust estate must be converted into money by the trustees.

The trustees, not having exercised the power of sale in respect to the share devoted to the support of the daughter, her children upon her death became immediately vested with the absolute title to said share and being of age are entitled to its immediate possession; they take as tenants in common and, as against the trustees and those holding future contingent estates in the other shares, they are also tenants in common and have a right to a division and partition of their share from the other three shares as provided by the Code of Civil Procedure.

ACTION to construe a will.

Smith & Wickes, for plaintiffs.

H. D. Hoffnagle, for defendants.

SPENCER, J. This action is to construe the will of George C. Weed, late of the town of Ticonderoga, N. Y. The testator died in January, 1902, leaving him surviving three sons and one daughter. By his will he bequeathed and devised all his residuary estate, including real and personal property, to four trustees (afterward by codicil increased to five and substitutions made) in trust, in the following terms:

"All the residue and remainder of my property, real and personal, which I shall own at my death, I give, devise, and

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bequeath unto David W. Easton, Dorus C. Bascom, John S. Weed, and Philip T. Weed (all residing in Ticonderoga) and to the survivors of them, who are hereby and herein appointed to be executors and trustees under this my last will and testament; in trust, however, for the uses and purposes herein specified, and I empower and direct them, or the majority of them, to settle, compound, and compromise and receive all debts, claims, and demands due to me, and I give them power to sell my real and personal property and convert the same into money, in the discretion of them or a majority of them, and I direct them to invest such money in productive real estate, or good interest-paying securities, when in their judgment it shall be for the interest of my estate and the beneficiaries named in this will so to do; and they are to let said real estate, and collect the rents thereof, and interest upon all securities in their hands. And they are to invest and keep invested all the principal of all moneys belonging to my estate, at interest, to the best of their judgment, and to take such securities for the payment of money loaned or invested, as they shall in their judgment deem good and ample to secure such loans and investments.

"After paying all necessary expenses and outgoes pertaining to the said property, such as taxes, insurance, repairs, and other expenses, if any, I direct my said executors and trustees to dispose of my property as follows, to-wit:—"

(Here follow four separate items, one for each of his four children, making substantially the same directions as to each of the four shares, but, by the use of a variety of expressions. The following will serve as an example:)

"I will and direct that the net income of one other fourth part and share of my estate be paid annually (or oftener in the discretion of my executors and trustees) by my said executors and trustees, to my son, Philip T. Weed, so long as he shall live for his support and maintenance.

"Upon the death of my said son, Philip T. Weed, they shall pay over the said one-fourth part of my estate to the lawful children of the body of said Philip T. Weed then surviving, and to the children or descendants of any deceased child of him then surviving, share and share alike,

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to their own use forever, the children or descendants of any such deceased child, however, to together take only what their parent would have taken if living at the death of said Philip T. Weed. Should any of said beneficiaries be infants at that time, then their portion shall be paid to them as and when they shall severally reach the age of 21 years, the income meantime to go to their support severally.

"In case my said son, Philip T. Weed, shall die leaving no child of his body nor any descendants of any such child him surviving, then I give, devise, and bequeath the said one-fourth share of my estate (the income of which is hereinbefore devised for his support) unto my other children surviving at his decease and to the children or descendants of any child of mine then deceased, share and share alike, to their own use and benefit, the children or descendants of any such deceased child, however, to take together only the portion which their parent would have taken, if living at the death of said Philip T. Weed. Should any of such beneficiaries be minors, then their portions shall be paid to them severally on their severally reaching the age of 21 years, the income meantime to go to the support of such minors severally."

At the time of his death, the testator possessed a considerable estate, mostly real property, and the residue consisting of both is now in the hands of the trustees substantially as it then existed. They have from time to time paid the income to the four children of the testator in equal shares. The necessity for a construction of the will is occasioned by the death of the testator's daughter and the claims of her children to receive their share of the estate.

The first question that arises is whether the devise to the trustees is in violation of the statute concerning the suspension of the power of alienation.

In this connection it will not be necessary to consider whether there was by the terms of the will an equitable conversion of the real into personal, as in that event the change would not avoid the statute; for the proceeds of a sale would be tied up in the same manner, and be as fatal to the scheme as before. Chap. Susp. Alien., § 68. We

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may, therefore, consider the trust scheme of the testator as applicable alike to real and personal property, as the statute applies in equal terms to both.

It is clear that, if the will creates a single trust to continue during the lives of the testator's four children, such trust is invalid unless the title to the trust property, upon the death of the testator, vested immediately in the persons comprising the several classes to whom it is directed to be paid upon the death of each of his children. For reasons which will be stated later on, I am of the opinion that the title did not so vest and, therefore, the determination of the legality of the trust must depend upon the question whether the testator intended one trust for the life of the four children or the creation of four separate and distinct trusts, one each during the life of each of his children.

Even a cursory reading of the will leaves upon the mind a strong impression that it was the master intention of the testator that the residue of his estate, forming the subject-matter of trust, should go to the descendants of his four children, each set of grandchildren to have an equal one-quarter of the property. There are some important differences in the language employed in the clauses affecting the different beneficiaries and legatees under each clause; but these differences do not in any degree dispel the impression that he intended to give to each of his children and its descendants equal portions of his estate and that, upon the death of each, its descendants, if any, should become entitled immediately to that share. The same result follows in case one of the testator's children dies without descendants; the share does not mingle with the remaining shares but goes directly to the surviving children of the testator and, except in one instance, to the descendants of those who have died. The property belonging to such share in no event goes to or becomes a part of the other remaining shares.

It is also apparent that the testator did not intend his trustees to make any physical separation or division of his estate into separate or independent parcels or funds. He contemplated the control and management of the property

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as an entirety so long as the same was practicable. The failure to authorize or direct a separation is significant. There is no reason why several distinct trusts may not hold property in common. For convenience of investment and to avoid loss by a forced sale, the funds may remain *in solido* while the interests therein are several. We find in the books numerous instances where separate and distinct trusts have held property in this manner. Manice v. Manice, 43 N. Y. 303; Savage v. Burnham, 17 id. 561; Stevenson v. Lesley, 70 id. 512; Matter of Verplanck, 91 id. 439, 443; Vanderpoel v. Loew, 112 id. 167.

As indicating the intention of the testator to create four separate trusts rather than one, we note, in the several clauses where he provides for the payment of income to his four children, he directs there shall be paid to them the net income of one-fourth part or share of his estate, and not one-fourth part of the income of his estate. It is still more apparent when we consider the bequests to his grandchildren and the language he employs in describing the shares that shall go to them. In each instance he says, "they shall pay over the said one-fourth part of my estate," referring in each instance to the share which has produced the income given to their parent. And in instances where one of his children shall die without leaving issue, the language to identify the share is still more definite. But the fact that the different trusts are made to terminate at different times and that, upon the termination of each trust, the property does not go into or remain a part of the general fund, but is given directly to grandchildren, if such grandchildren there be, and, if none, devised equally to the testator's other children and their descendants, is sufficient alone, in my opinion, to justify the conclusion that separate trusts were intended. This view, I think, finds support in the following decisions: Stevenson v. Lesley, 70 N. Y. 512; Vanderpoel v. Loew, 112 id. 167. If this be so, then we have here the creation of four separate and distinct trusts, each for the period of one life in being.

But it may be said that each of these several trusts may continue during the minority of any number of grand-

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children, and, inasmuch as a minority constitutes a life in contemplation of the statute, the provisions of the will, even if construed as creating four trusts, are still in violation of the statute. It is, no doubt, true that, if any of the takers are minors at the time of the falling in of a life estate, the trustees are required to hold possession of the shares of such minors during their minorities respectively; but the provision in that regard does not prevent a vesting of the title in such minors immediately upon the death of the life beneficiary. Upon the death of their parent, they each take a vested remainder in the share, the enjoyment of the same being postponed until they arrive at majority.

If I am correct in this construction, then there is no violation of the statute in respect to the suspension of the power of alienation, and the devise of the residue to the trustees is valid.

The next question is as to the title which vested in the trustees and the duration of the respective trusts. I think it is clear from the language of the will that the testator did not intend to vest an absolute title to the estate in the trustees. The grant is made "for the uses and purposes," only as in the will specified. The power to sell is also limited to the purposes of the trust to be exercised only upon the discretion of the trustees. Each trust falls strictly within the provisions of section 76 of the Real Property Law and is legal. The provisions of the will, in respect to those who shall take upon the falling in of the respective life estates, bring each grant within the qualifications of section 80, made by section 81 of the same statute. If this be so, then the devise to the trustees and the power of sale given to them is limited to the purposes of each trust and, if exercised in respect to any one trust, must be so exercised before the termination of such trust by the death of the life beneficiary, as the property of each trust thereupon becomes vested in the persons belonging to the class named in the devise.

But it is said that there has been an equitable conversion of the real property into personalty by the terms of the will, and that the entire estate is held by the trustees as such,

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and that, therefore, there has been no vesting of title in the remaindermen, and none will ensue upon the falling in of the life estates.

In attempting this subject, we may, I think, start out with the proposition firmly fixed in our minds that the testator did not intend any arbitrary partition or disadvantageous sale of his real property. His estate consisted mainly of that class and would not yield itself readily to such treatment. While he gives to the trustees a naked power of sale, its exercise is lodged in their discretion. While mere power of sale is not inconsistent with the theory of equitable conversion, nevertheless, when, as here, the exercise of the power is lodged in the discretion of the trustees, the inference is against the view that the testator intended such a conversion. The usefulness of such power is apparent in the management of any estate consisting largely of real property and carries with it no inference that the testator intended the conversion of all his real property into personalty.

Neither is there any direction or express authority lodged in the trustees to make division or partition of the estate between the several trusts created, or between any of the devisees or legatees.

Attention is called to the words "pay over" employed in each of the clauses which provides for the passing of each trust estate to the children of the life beneficiary. The use of these words in that connection should have no more significance than the use of the word "take," employed in the same connection, and the expression "shall go to and be divided," when employed in connection with the passing of the property to his other surviving children in case one shall die without issue. In the clause applicable to that class in the case of his son Philip, the testator makes use of the expression, "I give, devise and bequeath the said one fourth share." From the use of these various forms of expression it should not be inferred that the testator intended any other or different method or result in the one case than in the other. His lack of appreciation of the legal significance of the various terms he employs is too apparent to be mistaken and finds striking illustration

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in his use of the word "devise" as describing the gifts of income to his several children for their support. The intent of the testator must be gleaned from the entire will. As already stated, his master intent was to deal alike with each class of children and grandchildren; and the court, in searching for other intent, should not lay stress upon incidental and obvious lapses in the employment of terms. For the word "pay," as employed, is a gross misnomer in any view which may be taken. It has no application except in the discharge of debt or the fulfillment of promise and, in no event, may the rights and obligations of the trustees and the legatees or devisees in respect to each other be so regarded. To infer from its use that the bequest or devise to which it refers must *ex necessitate* be discharged by money, would be to magnify the importance of a single word and lose sight of the intent of the testator as disclosed by the general trend of the will and the purposes sought to be accomplished. If strict construction must be given to these particular expressions, then why not to others of a similar kind? But to do so would throw the entire scheme of the will into confusion and necessitate a different result in respect to each of the clauses, as in no two instances may they be said to be expressed in the same terms. It is true the word "pay" appears only in the clauses relating to children of a deceased life beneficiary taking upon the death of their parent, and is not found in instances where they take upon the death of an uncle or aunt, but I think it is not permissible to infer that the testator intended to make any distinction by the use of the different terms. It would call for a sale and conversion into money of the share in case the life beneficiary died with issue, but not so in case he died without issue. Another instance, indicating the improbability of his intending such a distinction, we may note in the clause concerning the share devoted to the support of his son Philip. He employs the expression "pay over" as to the children of Philip, the terms "devise" and "bequeath" as to his own children, and the word "paid" as to his other grandchildren. From considerations such as these and others which might be mentioned, I am

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of the opinion that the use of the words "pay over" does not necessitate a construction to the effect that the trust estate must be converted into money by the trustees.

If the foregoing conclusions find justification in the facts, then there is no equitable conversion of the real property into personalty by the terms of the will. To accomplish such a result, the provisions of the will must be of such a character as to leave no doubt of the testator's intent. Hobson v. Hale, 95 N. Y. 588. An equitable conversion may not be declared unless the manifest and declared purposes of the testator cannot be accomplished otherwise, for equity will never presume a conversion unless it is demanded to accomplish the lawful purposes expressed in the will. Chamberlain v. Taylor, 105 N. Y. 185. It must clearly appear that the purpose of the testator cannot be carried into effect in any other way. Fraser v. United Presb. Church, 124 N. Y. 479. In the absence of an express direction to sell, one may not be implied unless the design and purpose of the testator is unequivocal and the implications so strong as to leave no substantial doubt; and so, unless the exercise of the power is rendered necessary and essential by the scope of the will, the authority is simply discretionary and does not work a conversion. Scholle v. Scholle, 113 N. Y. 261.

I fail to find any purpose of the testator expressed in the will that cannot be accomplished without resort to the theory of conversion. His foremost intention was that the income of the residue of his estate should go to the support of his four children during their lives and at their death to their children respectively. All else is incidental. As to the manner by which the property should be partitioned, he does not say, but leaves that to be accomplished in the ordinary way and by the well-established methods.

In connection with this subject it is important to consider when the title vests in the respective devisees and legatees. Although there is no general devise or bequest to the persons who are to take upon the death of each life beneficiary, they are designated in a class and the words employed are sufficient to constitute both a devise and bequest. 2 Jarman

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Wills, chap. 22, p. 334. And when, as here, the direction is to pay to a class, only those persons who are members of the class at the time fixed for the payment take, and their interests do not vest until that time. Geisse v. Bunce, 23 App. Div. 289; Matter of Crane, 164 N. Y. 71.

In the case at bar it cannot be said that, prior to the death of a life beneficiary, any person is in being who, upon such death, would have an immediate right to the possession of the share held for the support of such life beneficiary. In case all the life beneficiaries should die at the same time, leaving no descendants, the testator, as to the property of all the trusts, would have died intestate. It is true that, if the deaths of the life beneficiaries are in succession, each trust will terminate upon that event; but, in case the last one shall die without children or descendant of other life beneficiaries him surviving, the same result would follow as above. In order to take, the person taking must survive the life beneficiary. Before that event actually takes place, it is impossible to say who of the class will survive I think, therefore, that title did not vest in the legatees or devisees upon the death of the testator; but that the members of each class took a future contingent estate in the property of the particular share, subject to be defeated by death before the death of the life beneficiary and also subject to the exercise of the power of sale by the trustees. Warner v. Durant, 76 N. Y. 133; Smith v. Edwards, 88 id. 92; Shipman v. Rollins, 98 id. 311; Matter of Baer, 147 id. 348.

We are now prepared to answer the question propounded in the third prayer of the complaint. The life beneficiary, Mrs. Wheeler, having died, leaving her surviving four children, to wit, the plaintiff, Herbert Wheeler, and the defendants, Annie Wheeler, Charles A. Wheeler, and George Wheeler, and the trustees not having exercised the power of sale in respect to the share devoted to her support, her children became immediately vested with the absolute title to said share and, being of age, are entitled to its immediate possession; they take as tenants in common, and, as against the trustees and those holding future contingent estates in the other shares, they are also tenants in common and have

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the right to a division and partition of their share from the other three shares in the way and manner provided for in the Code of Civil Procedure. Mellen v. Banning, 72 Hun, 176; 55 N. Y. St. Repr. 319; Blanchard v. Blanchard, 4 Hun, 287; 70 N. Y. 615; Chap. Exp. Trusts & Powers, chap. 15, § 557 *et seq.*, and note.

By the provisions of the Real Property Law (§ 49), all expectant estates are now descendible, devisable and alienable in the same manner as estates in possession. But this does not prevent a testator from making an expectant estate subject to be defeated by the exercise of a power of sale given to trustees which must be exercised before the owner of the expectant estate becomes vested with the absolute title.

The foregoing makes answer, so far as an answer is now possible, to the third prayer of the complaint. It is not possible, until after the death of each life beneficiary, to determine who shall be entitled to take the share devoted to his support. Those who take must not only live until his death, but must survive him.

It may be well here to note a distinction made in respect to the classes that shall take. In all instances they are alike, except in the case of the share devoted to the support of the testator's son Alfred. In that case the descendants of any child of Alfred who may not survive Alfred are not included.

In respect to the fourth prayer of the complaint, I know no rule of law and have not been referred to any which prevents a testator from empowering trustees to act by a majority thereof. The general rule is that, where more than one trustee is appointed, all must join in order to make their action legal. I think there are no exceptions to this rule, and any attempted departure therefrom by direction of the testator must be strictly construed and the power to act by less than the full number of trustees must be limited to the acts specifically designated in the will and may not be enlarged by implication. The clause, however, must be construed with the other provisions which authorize the survivors of the trustees to act; and, when so construed, I am of the opinion that the term "majority" has reference to a majority of the survivors and not to a majority of the full number of trustees. Hence, in case one trustee shall die,

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a majority of the survivors have the power in their discretion to do the particular acts mentioned in the will; but, as to all other matters, the whole number of survivors must act in order to make their action legal.

In respect to the fifth prayer of the complaint, which is made in view of the fact that one of the trustees, Alfred T. Weed, has been adjudged a lunatic, it is my opinion that lunacy is not the same as death; that he is still one of the trustees of said estate, and that, immediately upon his becoming a lunatic, it was the duty of his cotrustees to make application (Real Prop. Law, § 92; Code Civ. Pro., §§ 2817, 2818) for his removal and for the appointment of another trustee in his stead.

Let a decision and judgment in conformity with these views be presented for settlement upon five days' notice.

Ordered accordingly.

Matter of Filing for Record an Exemplified Copy of the Last Will and Testament, Proceedings of Proof, etc., of THOMAS COOPE, Late of the Town of Bellevue, in the County of Eaton and State of Michigan, Deceased.

(Surrogate's Court, Westchester County, March, 1907.)

Wills — Probate, establishment and annulment — Probate — Recording exemplified copy of foreign will — Procedure — Evidence.

Under the provisions of the Code of Civil Procedure for recording foreign wills (§§ 2703, 2704), where it appears by the petition that real property situated within this State was devised by a will which has been admitted to probate within another State where the testator resided and filed or recorded in the proper office as prescribed by the laws of that State; and where it also appears by the petition and the copy of the will thereto annexed that the will has been executed in conformity with the laws of this State, the will should be ordered to be recorded, although the proof of its execution rests upon the testimony of a single witness.

APPLICATION to record a will proved in another State.

Reeves & Scrugham and A. J. Burns, for application.

No other appearance.

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MILLARD, S. This is an application by the owner of certain real estate in the city of Yonkers to have an exemplified copy of a last will and testament and proofs thereof, as taken in Eaton county, Mich., recorded in this court in accordance with the provisions of sections 2703 and 2704 of the Code of Civil Procedure.

The petition clearly sets forth the ownership on the part of the petitioner of real estate situate in the city of Yonkers, within the State of New York; that such real estate was devised by the said last will and testament of Thomas Coope, who was, at the time of his death, a resident of Eaton county in the State of Michigan; that his will has been admitted to probate in said Eaton county in the State of Michigan and is filed or recorded in the proper office as prescribed by the laws of that State.

It also appears, from the petition and from an examination of the copy of said will thereto annexed, that said will was duly executed in conformity with the laws of this State, all of the requirements of our law having been shown to have been complied with by the very full attestation clause attached to the will and also by the testimony of the one witness, E. M. Kingsbury, who was sworn before the judge at the time of its probate. My attention has been called to the decision in Matter of Hagar, 48 Misc. Rep. 43; and, after carefully examining the facts in that case and also the decisions cited in the learned opinion, I am convinced that the *execution* of the will in conformity with the laws of this State must be shown to the satisfaction of the surrogate, but that it is not necessary to comply with the provisions and requirements of our law respecting the probate of a will to do this. If the Legislature intended otherwise, it would no doubt have made the provision read, "a will duly probated in conformity with the laws of this State" instead of "duly executed in conformity with the laws of this State." My examination of the cases cited in the Hagar case satisfies me that, in each case, it appeared directly from the papers submitted that, in some respect, the execution of the will had not been in accordance with the laws

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of this State; and, for that reason, the record of the will was denied.

I believe that the provisions of section 2703 of the Code of Civil Procedure have been complied with in every respect in the present application and that nothing appears upon the face of the petition or other papers submitted which shows that the will of Thomas Coope was not properly executed in accordance with the laws of this State; but, on the contrary, it appears from the allegations in the petition in this case, from the attestation clause attached to the will and from the testimony of the witness, Kingsbury, that all the requirements regarding execution of wills in the State of New York have been complied with and, under these circumstances, the papers submitted being authenticated as provided by section 2704 of the Code, I must direct that the will be recorded in this office.

Decreed accordingly.

Matter of the Application of ANDREW DITTRICH, Executor Under the Last Will and Testament of MARY DITTRICH, Deceased, for the Removal of ELLEN C. DUFFY, as Executrix and Testamentary Trustee Under the Said Will and Testament.

(Surrogate's Court, Kings County, March, 1907.)

Surrogate's Courts — Nature and extent of jurisdiction — Administration of decedents' estates — Settlement of claims on accounting by representatives — Claims against representatives — For transfers from decedent induced by fraud.

Banking — Deposits in savings bank — Title to deposit generally — Deposit in two names.

Gifts — In general — Particular instances — Bank deposits in joint names of donor and donee.

Executors and administrators — Accounting and settlement — Contests, objections and hearing and settlement thereof — Presumptions and inferences — Effect of vouchers.

Where a claim that an accounting executrix should be surcharged with the value of certain bonds and mortgages involves the question of whether their assignment had been procured by fraud, the Surrogate's Court has not jurisdiction to pass upon the claim.

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A widow, having considerable means, whose children were grown up and had families, was afflicted with a cancer. Having savings bank accounts in her own name she subsequently had them opened in the joint names of herself and her unmarried sister who lived with her, cared for her and attended to the household matters. The sister, who was also the executrix, and took under the will of the widow all her jewelry and ornaments, a dwelling having an equity of over $4,000 and over $9,500 in mortgages, put in a claim of $6,500 for care of the deceased, which she afterward withdrew because, as she said, "there has been too much talk about it", and also claimed the savings bank deposits. Her testimony that the deceased made a gift of the deposits to her was uncorroborated; and the bank officials, in whose presence the alleged transactions occurred, declared that they would open an account in the joint names where the parties said they desired to have it done for the sake of convenience. Held, that no gift had been established, and that the two bank deposits should be regarded as the property of the estate.

The burden of showing the impropriety of a payment to counsel for services rendered to the deceased during her lifetime is upon the contestant; and a mere objection to such payment will be overruled where there is nothing upon the face of the bill which is improper.

PROCEEDING for the removal of an executrix and testamentary trustee and the judicial settlement of her accounts.

Phelps, Evins & East and Francis G. Caffey, for contestants.

C. P. & W. W. Buckley, for accountant, Ellen C. Duffy.

CHURCH, S. The claim of the contestants that the executrix should be surcharged with the value of certain bonds and mortgages involves the question of whether their assignment had been procured by fraud; and, under the circumstances, this court has no jurisdiction to try the question. The subject is carefully considered in Matter of Ammarell, 38 Misc. Rep. 399, and it is unnecessary to add to what was there set forth.

The claim is made that the executrix should be surcharged with the amount in the Bushwick and German Savings Banks; but the executrix contends that this is her individual

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property. On the face of the accounts it appears that they are in the joint names. If nothing appeared but the form of the deposit and this had been the form in which it had been originally opened, it might be assumed that each had an equal interest. Wetherow v. Lord, 41 App. Div. 413.

Where, however, a person opens an account in a savings bank, depositing his own money, and afterward makes the account a joint one, this might justify a holding that it was the intention to have the survivor take the whole fund. Farrelly v. Emigrant Savings Bank, 92 App. Div. 529; affd., 179 N. Y. 594.

"There is some authority for holding that the change in the form of deposit, by which the son was enabled to draw equally with the mother, is evidence of an intent upon the part of the mother to constitute the son a joint owner with her in the fund."

The opinion in that case was written by Judge Hatch, who also wrote the opinion in Wetherow v. Lord, and by nothing in the Farrelly case is there indicated any intention of interfering with the doctrine announced in the earlier holding. In addition, the Farrelly decision held that the real question to be determined was the intent of the depositor in opening the account, which was to be discovered from all the facts.

The court also expressly said that it was in no way their intention to conflict with the decision in Matter of Bolin, 136 N. Y. 177, and the affirmance of the Court of Appeals may be taken as a reaffirmance of the doctrine in Matter of Bolin, *supra*. In that case, a woman having an account in her own name subsequently had it opened in the joint names of herself and her daughter. After the death of the mother, the daughter claimed the account.

In commenting upon this the court says: "In the absence of other evidence the transaction simply evidenced a purpose of the depositor of the moneys that they should be drawn out by either of the persons named."

In the case at bar the facts are very similar to those in the case quoted. The deceased was a widow, having considerable means; her children were grown up and had families of their own, and she was afflicted with a cancer. The execu-

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trix, who was an unmarried sister of mature years, lived with her and cared for her and attended to the household matters.

The opening of the account in this way is, therefore, as consistent with the motive of convenience as with any intention to make a gift of the deposit. It is claimed by the executrix, however, that, at the time the accounts were changed, the deceased made a gift of them to her.

This transaction occurred in the presence of certain bank officials, but they do not confirm the executrix, and her testimony as to the intention of the deceased is uncorroborated. The bank officials declare that they would open an account in this way where the parties said they desired to have it done for the sake of convenience.

The inference of the executrix that the deceased was grateful to her and that these accounts were presented as a recognition of her services or in the nature of payment is not sustained by the evidence, which, on the contrary, rather negatives such an assumption. The deceased had given the executrix all her jewelry and ornaments and by her will she left her a dwelling having an equity of over $4,000. The executrix had also two assignments of mortgages worth over $9,500, and in addition she put in a claim to the estate of $6,500 for caring for the deceased. That claim has been withdrawn, the reason being, she says, that there has "been too much talk about it."

It is apparent that this is a pretext and not a reason and that, when her official accounts came under judicial investigation, it became evident to her and to her counsel that it was extremely improbable that she could establish a just claim for this large sum of money against the deceased from whom she had received such substantial gifts as have been alluded to. If this is so, it follows that a person who would put in a fictitious claim against an estate for services rendered would be equally capable of putting in a fictitious claim against an estate as to gifts received from the deceased.

As a gift is never presumed, and as the entire evidence in this case fails to establish any intent on the part of the deceased to make a gift of these accounts, the sums on deposit

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in these two banks should be regarded as the property of her estate.

There is nothing in Matter of Barefield, 177 N. Y. 387, conflicting with this decision. That case could not have been carefully examined by counsel for the executrix, as the quotation contained in his brief was from a part of the opinion in which the question here under consideration was not the subject of examination by the court. All that that case held, so far as it is applicable to the state of facts in hand, was that the decision of the Surrogate's Court had support in the finding and was, therefore, justified. My decision in that case, as in this, announced that the controlling consideration was the question of intent, which I there determined from an examination of all the facts and circumstances.

With regard to the bill of seventy-five dollars paid to counsel, it appears that this was for services rendered to the deceased in her lifetime. The burden was, therefore, upon the contestants to show its impropriety; and, as there is nothing upon the face of the bill which is improper, I shall overrule the objection thereto.

Let findings and decree be prepared in accordance with this opinion.

Decreed accordingly.

Matter of LOUISA MALCOM STENTON, an Incompetent Person.

(Supreme Court, New York Special Term, March, 1907.)

Attorney and client — The relation with the client — Lien: Right to lien — Insanity of client as affecting lien; Enforcement — Determination of amount.

While the relation of attorney and client is terminated by the judicial declaration that the client is an incompetent, the attorney has a lien upon bank books that came into his possession in the course of his employment; and an order directing the surrender of the books and papers in the attorney's possession to the committee

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of the incompetent's property should contain a provision directing the committee to retain in its hands sufficient funds to satisfy the amount which may be awarded on a reference simultaneously ordered to determine the amount of the attorney's lien.

APPLICATION for an order directing the former attorney of an incompetent person to deliver certain books and papers to her committee.

Wilbur Larremore and Nelson S. Spencer, for petitioner.

Hugo Wintner, attorney in person.

LEVENTRITT, J. An incompetent person, prior to judicial declaration to that effect, has the right to employ an attorney. At most such a contract is voidable as any other contract of an insane person before the fact has been judicially determined. Blinn v. Schwarz, 177 N. Y. 252. Unless it is shown that some advantage was taken of the principal's infirmity it would seem that the right to employ an attorney stands, perhaps, on a securer footing than other contracts. And this is so from the very necessities of the case. Before the court has taken unto itself the custody of the incompetent's property and the administration of his affairs, the employment of one to safeguard his interests is a proper and wise precaution. There may be sufficient intelligence to recognize incompetency especially in the case of increasing senility — as here — and the wisdom of delegating the protecting of one's business affairs to an attorney. Even one judicially declared incompetent may in effect retain counsel to procure a discharge or release from the court's wardship, and in the event of nonsuccess the attorney's charge for services is properly paid out of the incompetent's estate. Matter of Larner, 68 App. Div. 320. In the case at bar the employment would seem to be sufficiently established. As an incident, the attorney's liens attached to the bank-books that came into his possession in the course of that employment. While the determination of Mrs. Stenton's insanity terminated the agency and employment of

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the attorney it did not as a matter of law destroy the lien. By the appointment of a committee the incompetent's property is taken in custody by the court, but the title thereto remains in the lunatic. The committee, as the court's officer, becomes a mere bailiff to administer in accordance with the court's direction. Matter of Otis, 101 N. Y. 580; Kent v. West, 33 App. Div. 113. While claims against the incompetent are, where assets are insufficient to pay all in full, usually paid *pro rata* without preference, yet where a lien has attached, equitably or legally, the court will protect it. Grant v. Humbert, 114 App. Div. 462, 465; Carter v. Burrall, 80 id. 396; Matter of Hopper, 5 Paige, 489. In the case at bar it seems desirable that the committee should presently be placed in possession of the books and papers in order to be able to secure funds toward the maintenance of the incompetent. At the same time the extent of the attorney's lien should be summarily determined. Grant v. Humbert, *supra*. There is nothing in the papers attacking his good faith or indicating that he has not performed services of value. An order should be entered directing the surrender of the books and papers to the committee and a reference should be had to determine the amount of the lien. The order should contain a provision directing the committee to retain in its hands sufficient funds to satisfy the amount which may be awarded on the reference.

Ordered accordingly.

THE ALFRED J. BROWN SEED CO., Appellant, *v.* CHARLES RICHARDSON, Respondent.

(Supreme Court, Erie Special Term, March, 1907.)

Foreign corporations: Recognition, regulation and status — What is carrying on business; Actions and proceedings — Issues and proof.

The plaintiff, a Michigan corporation engaged in buying and selling fruit, under an arrangement with defendant, a commission man and fruit dealer at Buffalo, N. Y., bought peaches in Michigan and shipped them to defendant at cost price in Michigan, each shipment being accompanied by a draft for the amount which defendant

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was to pay; and defendant was to sell the peaches and any profit was to be equally divided between the parties. In an action to recover the balance alleged to be due, held, that, whatever the legal effect of the agreement between the parties was, their dealings did not constitute a "doing of business" within this State, on the part of the plaintiff, within the meaning of section 15 of the General Corporation Law (L. 1890, ch. 563).

In order to justify a dismissal of an action brought by a foreign corporation on the ground of failure to obtain a certificate under section 15 of the General Corporation Law, it must appear that the plaintiff is a foreign stock corporation.

APPEAL from a judgment of the Municipal Court of Buffalo.

Frederick O. Bissell, for appellant.

William C. Carroll, for respondent.

WHEELER, J. Upon the trial in the Municipal Court the plaintiff was nonsuited. The nonsuit was doubtless granted on the alleged ground that the plaintiff was a foreign corporation, engaged in doing business within the State of New York without first having obtained the statutory certificate permitting it to transact business within the State.

The facts as disclosed by the evidence briefly stated are these: The plaintiff is a Michigan corporation engaged in buying and selling fruit. Its president came to the city of Buffalo and there made an arrangement with the defendant, Richardson, who is a commission man and fruit dealer at that place, by which the plaintiff was to buy peaches in Michigan and ship them to the defendant in Buffalo. The peaches were to be billed to the defendant at cost price in Michigan, and each car shipment was to be accompanied by a draft on the defendant for that amount, which defendant was to honor. The defendant was to pay the draft and sell the peaches, and any profit realized from their sale was to be divided equally between the plaintiff and defendant.

The action is brought to recover a balance alleged to be due the plaintiff by reason of transactions had under this

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alleged arrangement. The plaintiff is entitled to recover, unless a recovery is barred by reason of a failure to comply with the statute in question.

The suggestion has been made that the arrangement stated constituted a co-partnership, but I do not so regard it. The testimony is that, having made losses on the ordinary commission basis heretofore carried on through other agents, the defendant proposed a mode of business by which the plaintiff would suffer no loss; and that was by shipments in the manner above stated, in which the defendant was to take the peaches at cost price in Michigan, and to divide the profits when sold. The plaintiff was not to stand any share of the loss if any. It would appear (if the plaintiff's version of the transaction is correct) that the dealings rather amounted to a sale of the peaches to the defendant and that, from the time of their delivery on the cars, the fruit was at the defendant's risk, the price to be ultimately paid being the cost price plus one-half any profits made. But, whatever the legal effect of the agreement between the parties, I do not think their dealings constituted a doing of business within the State within the meaning of the statute.

In order to bring a corporation within the condemnation of section 15 of the General Corporation Law there must be something more than an occasional transaction.

As was said in Penn Collieries Co. v. McKeever, 183 N. Y. 103, the evidence should establish a continuous business. "To be 'doing business in this State' implies corporate continuity of conduct in that respect; such as might be evidenced by the investment of capital here, with the maintenance of an office for the transaction of its business, and those incidental circumstances, which attest the corporate intent to avail itself of the privilege to carry on a business.

"In short, it should appear, as it was intimated in the opinion in People ex rel. Armstrong Cork Co. v. Barker (157 N. Y. 159, 165) that the corporation and its officers intended 'to establish a continuous business in the City of New York and not one of a temporary character.'"

The facts proven in this case do not bring it within the

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rule laid down in those cases. The transactions related only to one particular kind of fruit, to-wit: peaches. The season was necessarily short. The plaintiff had no control over the consignment after it was made. It kept no offices here. It had no capital invested here. It is well established that the sending of an agent through a State to obtain orders for goods manufactured in another State and to be shipped from there to a purchaser here does not violate the statute. Vaughn Machine Co. v. Lighthouse, 64 App. Div. 138; Tallapoosa Lumber Co. v. Holbert, 5 id. 559.

None of the recognized tests bring this case within the condemnation of the statute. Moreover, it has recently been held that, in order to justify a dismissal of an action brought by a foreign corporation on the ground of failure to obtain a certificate under section 15 of the General Corporation Law, it must also appear that the corporation is a foreign stock corporation. South Bay Co. v. Howey, 113 N. Y. 382; Wright & Co. v. Faulkner, 52 Misc. Rep. 100.

Whether this plaintiff is a stock corporation or not does not appear.

We are, therefore, of the opinion the judgment appealed from should be reversed and a new trial had in the Municipal Court, costs of this appeal to abide the event.

Judgment reversed and new trial ordered, with costs, to abide event.

JOHN E. COLEMAN, Respondent, *v.* MITCHELL B. KEADY, Appellant.

(County Court, Yates County, March, 1907.)

Justices of the peace — Appeal and error — Review — Questions considered — Relief from default — Manifest injustice.

Code of Civil Procedure, § 3064.

Where, upon appeal from a justice's judgment taken upon defendant's failure to appear, the affidavit of his attorney shows that defendant gave him the summons served with directions to put in an answer; that defendant stated the supposed case to the attorney

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who advised him that, if it was the same, defendant had a good and valid defense; that the attorney had other engagements which so occupied his time that he forgot, and the direction of the defendant was not carried out; that the attorney omitted to make entry in his journal on his return to his office, all of which was on account of pressure of matters of business; and, by way of excusing delay in bringing the appeal to argument, the attorney states, in another affidavit, that he has been endeavoring to settle the differences between the parties, both of them having been his clients, and that the plaintiff had expressed a desire that that be done; and the defendant also swears, in an affidavit supplementing the statements of his attorney, that he is not indebted to the plaintiff, and never was, for the alleged cause of action upon which the judgment was rendered, the judgment must be affirmed upon the ground that the defendant has neither made "a satisfactory excuse for his default" nor established that "manifest injustice has been done" within the meaning of section 3064 of the Code of Civil Procedure.

APPEAL from a judgment of a justice of the peace.

Lyman J. Baskin (Thomas Carmody, of counsel), for appellant.

Huson & Lincolnn, for respondent.

KNOX, J. This is an appeal under section 3064 of the Code of Civil Procedure from a judgment of a justice's court taken upon default of defendant to appear on the 19th day of June, 1906.

Under this section it becomes necessary for a defendant against whom a judgment by default has been taken before a justice to satisfactorily show that "manifest injustice has been done" and render "a satisfactory excuse for his default." Jewell v. Heinzel, 6 Daly, 411.

We have submitted to us the return of the justice and the affidavits of the defendant and his attorney.

An analysis of the affidavit of the attorney shows that the defendant, when the summons was served on him, handed it to the attorney with directions to put in an answer and join issue on the return day of the summons; that the defendant had stated the supposed case to the attorney and the attorney had advised him after such statement that, if it was

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the same, the defendant had a good and valid defense thereto; that the attorney had other engagements which so occupied his time that he forgot and the direction of the defendant was not carried out; that the attorney omitted to make entry in his journal as was his usual custom, on his return to his office in Geneva, all of which was on account of the pressure of matters of business upon him; and, in his second affidavit, the attorney, by way of excusing delay in bringing the appeal to argument, states that he has been endeavoring to settle the differences between the parties, both of them having been his clients, and the plaintiff has expressed a desire to have an amicable adjustment of his differences with the defendant.

The defendant in his affidavit supplements the statements made by the attorney in his affidavit and then says, "that deponent is not indebted to the said plaintiff and never was for the alleged cause of action upon which said judgment was rendered as he was able to prove on a trial for which this appeal was taken and will suffer great loss if the said judgment is not reversed and a new trial granted."

I am of the opinion that the appellant has not made out a case under the section of the Code cited.

It will be observed that, to bring himself within the provisions of the section, he must establish two things, namely, he must make out "a satisfactory excuse for his default," and establish that "manifest injustice has been done."

I think he has failed in the former fact; but, assuming for the purposes of this case he has shown a proper excuse for the default, still it is necessary the other fact shall also be thoroughly established.

The most that may be maintained in behalf of defendant is that the affidavits contain an affidavit of merits. This alone is not sufficient.

The facts and circumstances must be shown from which an inference may be drawn, or from which it may appear, that manifest injustice has been done. The defendant swears that he "is not indebted to the said plaintiff and never was for the alleged cause of action upon which said judgment was rendered."

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Clearly this is simply a statement or conclusion of the defendant and not such a spreading out or averment of the facts and circumstances as is required to satisfy the provisions of the section or well-known adjudicated cases. 2 Waits' Law & Practice (3d ed.), 847 *et seq.*; Young v. Conklin, 3 Misc. Rep. 122; Jewell v. Heinzel, 6 Daly, 411; Mullane v. Roberge, 21 Misc. Rep. 342.

The judgment of the justice's court is affirmed, with costs.

Judgment affirmed, with costs.

GEORGE KELLAR, Respondent, *v.* THE CENTRAL TELEPHONE & TELEGRAPH CO., Appellant.

(County Court, Onondaga County, March, 1907.)

Damages — Double and treble damages — Who to sue.
Trespass — Actions — Right of actions and defenses — Title and possession — Highway.
Abutting owners — Rights and liabilities in general — Rights as to trees.

The right of action given by sections 1667 and 1668 of the Code of Civil Procedure to recover treble damages against any person who cuts down or carries off any wood, underwood, tree, or timber, or girdles or otherwise despoils a tree on the land of another, without the owner's leave, is based upon the theory of an injury to the land owned by the person injured, and an action can be maintained only by the owner of the fee.

Upon an appeal from a justice's judgment, awarding treble damages for breaking off a limb from a tree in front of plaintiff's premises, plaintiff made no claim to be the owner in fee of the street. Held, that the defendant was a trespasser and that plaintiff was entitled to recover his actual damages and was entitled to recover such damages without regard to whether the defendant was negligent or not, but was not entitled to treble damages, and that the judgment should be modified accordingly.

THE defendant company, while engaged in erecting a telephone pole in the street in front of the plaintiff's premises in the village of East Syracuse, Onondaga county, New York, broke off a limb from a tree in front of the plaintiff's

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premises. This action was brought in justice's court to recover treble damages for such injury pursuant to the provisions of sections 1667 and 1668 of the Code of Civil Procedure.

Nelson L. Lansing, for plaintiff-respondent.

Goodelle, Nottingham Brothers & Andrews (William H. Harding, of counsel), for defendant-appellant.

Ross, J. A judgment was obtained before the justice of the peace for substantial damages, which amount he trebled under the sections above cited, and from such judgment this appeal is taken. The evidence is not very precise as to whether the tree was upon the land owned by the plaintiff or immediately in front of his premises in the street; but, as I understand, the plaintiff does not claim upon this appeal that he owned the fee to the street. I believe that only an owner of the fee can invoke the benefits of the sections cited.

The language of section 1667 is: "If any person cuts down or carries off any wood, underwood, tree, or timber, or girdles or otherwise despoils a tree on the land of another, without the owner's leave." It would seem that the action is based upon the theory of an injury to the land owned by the person injured. The statute is highly penal, and should not be extended by implication. The case of Van Siclen v. Jamacia El. L. Co., 45 App. Div. 1, cited by the plaintiff-respondent does not hold that an abutting owner can recover treble damages. As cited on page 5, "The proof upon the trial was undisputed that the entry was without consent, and that the cutting was done for the most part, if not all, within the line of the plaintiffs' premises." The plaintiff, however, is entitled to recover the actual damage which he has sustained. Van Siclen v. Jamacia El. L. Co., 45 App. Div., and Donahue v. Keystone Gas Co., 181 N. Y. 313, the cases cited by the defendant to sustain the claim that the right of the defendant company in the street was paramount to that of the plaintiff, assume that the act complained of was necessary in order to effect the purpose of the franchise.

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It only has to be stated that a grant to effect a purpose does not give the right to unnecessarily injure the property of another. In the case under consideration there is no claim that the act complained of was necessary. It may be claimed, under the evidence, that it was accidental, but that is far removed from a necessary act. It is claimed by the defendant that there can be no recovery of the actual damages, because there is no evidence, or insufficient evidence, of negligence. The evidence is meager in this regard as, for instance, whether the defendant employed sufficient men or had suitable apparatus. Negligence is not a necessary element to sustain a recovery. The plaintiff had a property right in the tree injured and the defendant was a trespasser, a wrongdoer.

Evidence was given upon the trial of the depreciation of the value of the plaintiff's premises and also of the cost of replacing the tree; and evidence was given as to the extent of the injury to the tree, which, upon any theory of the measure of damages, sustains the amount of actual damages awarded by the justice. The judgment may be modified by reducing the recovery to the amount of actual damages found by the justice, and judgment for that amount and the costs in justice's court is affirmed, without costs of this appeal to either party. Code Civ. Pro., § 3066, subd. 5.

Judgment modified accordingly, and, as modified, affirmed, without costs of appeal to either party.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* JOE CIMINI, Appellant.

(County Court, Yates County, March, 1907.)

Criminal procedure — Proceedings on review — Right of review and procedure — Proceedings to obtain review: Service of affidavit, etc.— Review — Matters not in record — Conclusiveness of return.

Code of Criminal Procedure, §§ 752, 754, 760.

Where no copy of the affidavit upon which an appeal from a conviction in a police court, together with notice that the appeal had been allowed, has been served upon the district attorney, as required

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by section 752 of the Code of Criminal Procedure, nor an undertaking given as required by section 754, nor the appeal brought to argument at the next term of the County Court, and no justification for continuing the case "by special order," as provided by section 760, exists, the appeal will be dismissed on motion of the district attorney.

It seems, that, upon the hearing of an appeal from a conviction in a police court, the return of the magistrate cannot be attacked collaterally.

MOTION to dismiss an attempted appeal from a judgment rendered in police court, adjudging the defendant guilty of assault in the third degree, for failure to prosecute the same as provided in sections 759 and 760 of the Code of Criminal Procedure, and on the ground that service has not been made on the district attorney as directed by sections 752 and 761 of the same Code.

Thomas Carmody, for appellant.

Spencer F. Lincoln, district attorney, for People.

KNOX, J. The defendant has attempted to take an appeal from a judgment rendered February 5, 1907, adjudging him guilty of an assault in the third degree. The judgment was rendered in police court.

The return was made and filed February 8, 1907.

The appeal is based upon affidavits alleging that the magistrate failed to advise the defendant that he was entitled to counsel and proceeded to try him, without having so advised him, and without permitting him to procure counsel.

The defendant had an absolute right to take an appeal, and alleged good ground for it, if true.

The practice on appeals from Courts of Special Sessions is clearly defined in title 3, part 5, of the Code of Criminal Procedure. Section 752 of that title, after providing for the presentation of the affidavit to the judge, reads as follows: "And the defendant, or his attorney, must, within five days thereafter, serve a copy of the affidavit upon which the appeal is granted, together with a notice that the same has

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been allowed, upon the district attorney of the county in which the appeal is to be heard."

This was not done in this case.

To perfect such an appeal an undertaking must be given and immediately filed with the clerk of the County Court; and that officer is required, within five days thereafter, to give notice to the district attorney that such bond has been filed, which notice shall give the names of the defendant and his sureties, the offense for which the defendant was charged and the amount of the bail given. Section 754.

The affidavit must be delivered to the magistrate within five days, and when so delivered the appeal is deemed taken. Section 755.

Other sections point out the duty of the magistrate as to making a return, the filing of the same in the office of the county clerk and the time within which he shall so make and file it.

"The appeal must be heard on the original return." We quote sections 759–761.

"§ 759. The appeal must be brought to argument by the defendant at the next term, upon a notice of not less than ten days before said term to the district attorney of the county.

"§ 760. If the defendant omit to bring the appeal to argument, as provided in the last section, the court must dismiss it, unless it continue the same, by special order, for cause shown.

"§ 761. The defendant must serve upon the district attorney, a copy of the return, with or before the notice of argument. If he fail to do so, the appeal must be dismissed, upon proof of the failure, unless the court otherwise direct."

There is no pretense of an attempt at compliance with section 759, nor has the service been made on the district attorney required by section 761.

Counsel for appellant gives no satisfactory excuse for noncompliance with the provisions of the sections pointed out, but stoutly insists that the appeal ought to be heard upon the merits, and that it is within the discretion of the court to work such disposition of the case as will bring about such result.

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I have examined the return made in this case and find that the magistrate has met the ground upon which the appeal is taken by stating, positively, that he informed the appellant of his right to counsel at the time he was arraigned before him; and again, on the next day, which was the day of the trial, "I again informed him of his right to counsel and I stated to him that as a result of the trial he might be imprisoned and that he should have a lawyer. He said he was ready to be tried."

This return cannot be attacked collaterally and, therefore, were the argument of the appeal before me, an affirmance would have to follow.

Good reason for any delay does not appear, nor does justification for continuing the case in any manner "by special order" exist, in my opinion.

The motion should be granted and the appeal should be, and is, dismissed for noncompliance with the sections of the Code of Criminal Procedure hereinbefore pointed out, and for the further reason that the return shows no merit left for the argument of the appeal.

A proper order in conformity with the views herein expressed will be prepared.

Appeal dismissed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* DOMINIC VERSAGE, Appellant.

(County Court, Yates County, March, 1907.)

Criminal procedure — Proceedings on review — Right of review and procedure — Proceedings to obtain review — Delivery of affidavit and allowance of appeal.

Where the affidavit upon which an appeal from a conviction for intoxication in a public place was allowed was not delivered to the magistrate within five days, as required by section 755 of the Criminal Code, so that no return of the magistrate could be made, the appeal must be dismissed.

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MOTION to dismiss appeal for want of prosecution and because the appeal has not been perfected.

Thomas Carmody, for appellant.

Spencer F. Lincoln, district attorney, for People, respondent.

KNOX, J. The defendant was convicted in police court of Penn Yan, July 22, 1905, for intoxication in a public place. The affidavit upon which the defendant sought to set out the ground of his appeal was verified July 25, 1905.

It appears to have been filed in the Yates county clerk's office September 22, 1905. No return is on file and the affidavit has not been delivered to the magistrate so that a return could be made.

Clearly the defendant has lost all rights he may have had to have his case reviewed, and the court has no power to relieve him. Sections 752, 755, 759 and others following of the Code of Criminal Procedure.

Order for dismissal of the appeal and for carrying the judgment into effect may be presented.

Appeal dismissed.

ANDREW TIRPAK, Respondent, *v.* ROBERT HOE AND CHARLES W. CARPENTER, Appellants.

(Supreme Court, Appellate Term, April, 1907.)

Depositions — Depositions on commission — Application for commission — Who may make affidavit — Sufficiency of affidavits; Not refused by delay which has not prejudiced adversary.

Where, upon a motion for a commission to examine a non-resident witness, the allegations of the moving affidavits concerning the residence of the witness and his absence from this State are upon information and belief, the sources of such information and the grounds of such belief must be stated, and the reasons given why the affidavit of a person having personal knowledge of the matter

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is not produced; and, if the affidavit was made by the attorney for the moving party, the reason must be given why such affidavit was not made by the party himself.

Upon such motion, the affidavit of one who was given in two other affidavits, made on information and belief, as the source of such information, that he was acquainted with the non-resident witness; that said witness now resides in the city of Newark, in the State of New Jersey, and is now in said State and not within the State of New York, is sufficient; the exact place of his residence need not be stated.

Where such motion is made before the cause appeared on the day calendar for trial and there is nothing to indicate that plaintiff has been prejudiced by the delay, the motion may be granted as against an objection of laches.

APPEAL by the defendants from an order denying a motion to take the deposition of a witness without the State, entered in the City Court of the city of New York.

Edward G. Pringle, for appellants.

Jones & Nekarda, for respondent.

GILDERSLEEVE, J. This is an appeal from an order of the City Court denying defendants' motion for a commission to take the deposition of a witness without the State. As the court below wrote no opinion, we presume his reasons for denying the motion are those urged by respondent's counsel in support of the order. Three grounds are stated by the latter, in justification of the denial of the motion, as follows: (1) Laches; (2) insufficiency of two of the moving affidavits, because the nonresidence is alleged on information and belief; and (3) insufficiency of the moving affidavits, because no street number is given of the residence of the witness sought to be examined. None of these grounds is well founded. It is true that, where the allegations of the moving affidavits concerning the residence of the witness and his absence from this State are made upon information and belief, the sources of such information and the grounds of such belief must be stated, and a reason given why the affidavit of a person personally familiar with the

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matter is not produced; and, if the affidavit is made by the attorney for the moving party, a reason must be given why such affidavit was not made by the party himself. Fox v. Peacock, 97 App. Div. 501. In the case at bar there are three moving affidavits; the first by the attorney, the second by one of the defendants, and the third by one Bowers. The first two are on information and belief, giving said Bowers as the source of such information. The latter swears he is acquainted with Charles Wening, whose testimony defendants seek to take under a commission, and he states, as of his own knowledge, that "said Charles Wening now resides in the City of Newark, in the State of New Jersey, and is now in said State and not within the State of New York." It is true that he gives neither the number of the house nor the name of the street where the witness resides; but the affidavit used on a motion for a commission to examine a witness, who is resident of another State, need not set out the exact place of his residence. Dambmann v. Met. St. Ry. Co., 110 App. Div. 166. The facts shown by the moving papers bring this case within section 888 of the Code. The testimony of this witness is material and necessary to the defendants; he is not a resident of the State of New York, but resides in Newark, in the State of New Jersey, and he is at present out of the State of New York. So far as laches are concerned, it is true that defendants have been slow in their procedure in this matter; but the motion was made, apparently, before the cause appeared on the day calendar for trial, and there is nothing to indicate that plaintiff has been prejudiced by the delay.

The order must be reversed and the motion granted, with ten dollars costs and disbursements.

GIEGERICH and ERLANGER, JJ., concur.

Order reversed and motion granted, with ten dollars costs and disbursements.

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ANDREW TIRPAK, Respondent, *v.* ROBERT HOE AND CHARLES W. CARPENTER, Appellants.

(Supreme Court, Appellate Term, April, 1907.)

Discovery and inspection — Examination of party before trial — Right to remedy: Physical examination; Examination at instance of adverse party — When allowed in general.

Upon an affidavit setting forth that defendants in an action for personal injuries are ignorant of the nature and extent of the injuries complained of, of the manner in which they were sustained, and of other material facts within the personal knowledge of plaintiff as to the manner in which the alleged injuries happened to him, an order for his oral examination as a party before trial may properly include a provision for his physical examination.

Even if defendants might have procured the information asked for by a bill of particulars, they had a right to obtain it under an order for his examination as a party before trial.

Where the requirements of sections 870, 873 of the Code of Civil Procedure and the General Rules of Practice have been complied with, a motion for an order for the examination of a party before trial must be granted unless made in bad faith.

Under section 3189 of the Code of Civil Procedure, as amended in 1902, the Supreme Court has full power to review discretionary orders of the City Court of the city of New York.

APPEAL by the defendants from an order of the City Court of the city of New York made at Special Term, modifying an order for the examination of the plaintiff as an adverse party before trial and for his physical examination.

Edward G. Pringle, for appellants.

Jones & Nekarda (L. B. Treadwell and R. W. Darling, of counsel), for respondent.

GIEGERICH, J. The action is to recover damages for a personal injury by reason of the alleged negligence of the defendants. The defendants procured an order for the examination of the plaintiff as an adverse party before trial, which included a provision for his physical examination. Among the affidavits upon which such order was made, the

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affidavit of Charles W. Carpenter sets forth, among other things, that the defendants are ignorant of the nature and extent of the injuries complained of, of the manner in which such injuries were sustained, and of other material facts within the personal knowledge of the plaintiff as to the manner in which the alleged injuries happened to the plaintiff. The order required the plaintiff to appear before the referee therein named, to be examined as an adverse party before trial "concerning the nature, location, extent and effect of the alleged injuries complained of in the complaint, and concerning the manner in which the said injuries were sustained, and concerning the other matters referred to in the said annexed affidavit of Charles W. Carpenter." The plaintiff subsequently applied for and obtained, notwithstanding the opposition of the defendants thereto, an order modifying the above-mentioned order by striking out the words "and concerning the manner in which said injuries were sustained, and concerning the other matters referred to in said affidavit of Charles W. Carpenter," thus restricting the oral examination to the nature and extent of the alleged injuries, and the defendants have brought on this appeal. The motion to modify the order was based solely upon the papers upon which it was granted, but the defendants submitted affidavits in opposition. The notice of motion sets forth and the order appealed from recites two grounds of the application, viz., that the information sought on the general examination of the plaintiff as to the manner in which he was injured (1) is not within the purview of section 873 of the Code of Civil Procedure, but consists of matters to be passed upon by a jury and not by a referee, and (2) could only have been ascertained by a bill of particulars. As to the first ground, the affidavit of Mr. Carpenter states "that the defendants desire to take the deposition of the said Andrew Tirpak, the plaintiff herein, under and pursuant to the provisions of section 870 *et seq.* of the Code of Civil Procedure" and upon a reading of such order it will be seen that it directs the examination of the plaintiff as a witness before trial, upon the matters indicated, under section 870 of the Code, and a physical

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examination under section 873 of the Code. Such practice is directly sanctioned by the language of section 873 of the Code which, so far as applicable, provides that "in every action to recover damages for personal injuries, the court or judge, in granting an order for the examination of the plaintiff before trial may, if the defendant apply therefor, direct that the plaintiff submit to a physical examination * * * and such examination shall be had and made under such restrictions and directions as to the court or judge shall seem proper." The Court of Appeals, in Lyon v. Manhattan Ry. Co., 142 N. Y. 298, 305, construing these provisions, which were added by chapter 721 of the Laws of 1893, said: "The statute has in terms provided that the physical examination shall be procured in the same way and as part of an examination of the party before trial, and in that way only and by conforming to the general provisions of law on the subject can the object and purpose of the amendment ever be attained. This construction gives effect to every word of the section as amended, and is in harmony with the other sections immediately preceding and following it. Then the referee becomes something more than a mere spectator at an idle ceremony. He may take the plaintiff's testimony upon the issue and report to the court as upon an examination before trial."

The doctrine of this case was followed and applied in Lawrence v. Samuels, 20 Misc. Rep. 278, 280, where the Appellate Term, speaking through Mr. Justice Bischoff, said: "The physical examination, which the statute renders available, may be procured only as an incident to the examination of a party before trial and is subject to the general rules governing such an examination and the application therefor (Code Civ. Pro. §§ 870, 872, 873; Lyon v. Man. Ry. Co., 142 N. Y. 298, 305)."

Under these authorities, the order for the physical examination of the plaintiff, as well as his oral examination regarding the manner of the accident was, upon the facts disclosed, fully authorized; and hence the modification of the order whereby the oral examination of the plaintiff is restricted to the physical injuries complained of cannot be

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sustained upon the ground first considered. The second ground assigned in the notice of motion and order of modification, viz., that the information sought could have been procured by a bill of particulars, is equally untenable. Even if the defendants might have obtained such information in that way, which, however, the papers do not disclose, they were not limited to this method of obtaining it, but they had the right to obtain it by an examination of the plaintiff under an order for his examination as an adverse party before trial. Dudley v. New York Filter Mfg. Co., 80 App. Div. 164. In the case last cited the order was upheld although a bill of particulars had already been furnished. Further authorities in support of the defendants' position will be found in the recent decisions of the Appellate Division of this department in Goldmark v. U. S. Electro Co., 111 App. Div. 526; McKeand v. Locke, 115 id. 174; Hill v. McKane, 101 N. Y. Supp. 411. These cases have established a more liberal practice in reference to depositions before trial than has heretofore prevailed, and, briefly stated, hold that bad faith alone can defeat the right to an examination of a party before trial, provided the requirements of the Code of Civil Procedure and the General Rules of Practice have been complied with. There is no claim on the part of the plaintiff that the defendants have not conformed to such requirements. The court below did not hand down an opinion, and the memorandum of the decision does not disclose the ground for the modification of the order and the granting of the order appealed from. It may, therefore, be assumed that the decision was based upon either one or both of the sole grounds referred to in the notice of motion. As seen, such modification cannot be sustained under the authorities above cited; nor have I been able, after careful examination, to discover any grounds upon which it can be sustained. The affidavit of Mr. Carpenter shows, without contradiction, that the defendants are ignorant of the facts concerning which they seek to examine the plaintiff and, therefore, the scope of the examination provided for in the original order was proper; and such examination should not have been limited to the mere

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nature and extent of the plaintiff's injuries, but should have permitted inquiry into the manner of the happening of the accident. It is also urged by the plaintiff that this court cannot review the exercise of discretion by the court below in restricting the oral examination of the plaintiff; but, upon examining the cases cited by him in support of such point, it will be seen that they were decided before section 3189 of the Code was amended by chapter 515 of the Laws of 1902, which provides that upon an appeal from an order of the City Court this court "shall have full power to review any exercise of discretion by the court or judge below."

The order appealed from should, therefore, be reversed, and the order for the examination of the plaintiff in its original form reinstated, with costs and disbursements to the appellants.

GILDERSLEEVE and ERLANGER, JJ., concur.

Order reversed and order for examination of plaintiff in its original form reinstated, with costs and disbursements to appellants.

CHARLES WOLFERT, Appellant, *v.* THE NEW YORK CITY RAILWAY COMPANY, Respondent.

JAMES WILKINSON, Appellant, *v.* THE NEW YORK CITY RAILWAY COMPANY, Respondent.

JOHN KERIN, Appellant, *v.* THE NEW YORK CITY RAILWAY COMPANY, Respondent.

(Supreme Court, Appellate Term, April, 1907.)

Municipal Courts — Procedure — Relief from default.

Where the summons in a Municipal Court action was duly served and filed and the case placed on the day calendar and the plaintiff failed to appear on the call of the calendar, the court may, under section 253 of the Municipal Court Act (L. 1902, ch. 580), open plaintiff's default.

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APPEAL by the respective plaintiffs from orders denying motions to open defaults in the Municipal Court of the city of New York, third district, borough of Manhattan.

Harcourt Bull, for appellants.

James L. Quackenbush, for respondent.

GILDERSLEEVE, J. It appearing that the summonses in these actions were duly served and filed and the cases placed upon the calendar the court below had a right to open plaintiffs' defaults. Some confusion seems to have arisen in the Municipal Court regarding the power of that court to open a default where the plaintiff is the defaulting party, evidently owing to a failure to distinguish the facts in the case of Lefenfeld v. Adler, 51 Misc. Rep. 66, in which this court held that the remedy of the plaintiff was by appeal only and not by motion to open his default, and the facts in cases like these at bar. In the former case, the plaintiff was not in default. He appeared and made a motion for an adjournment which motion was denied, and he refused to proceed further with the case and it was dismissed. He could have proceeded with the trial and, if defeated, appealed from the judgment and had the refusal to grant the adjournment reviewed on appeal or he could have begun his action anew. Clearly he was not in default. In the cases at bar, the court had acquired jurisdiction of the parties, and upon the call of the calendar no one answered on the part of the plaintiff. The Municipal Court Act, (§ 253) does not discriminate as to which party shall move to open "a default," but the distinction between a default, which is a failure to appear, and an appearance, must always be borne in mind.

The orders in each of these cases will be reversed and trials ordered, with costs to the appellant to abide the event in each case, and the motion to open the default granted upon payment of ten dollars costs in each case in the court below.

GIEGERICH and ERLANGER, JJ., concur.

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Orders reversed and new trials ordered, with costs to appellant to abide event in each case, and motion to open default granted upon payment of ten dollars costs in each case in court below.

KIBA DORFMAN, Respondent, *v.* MORRIS HIRSCHFIELD, Appellant.

(Supreme Court, Appellate Term, April, 1907.)

Municipal Courts — Procedure: Adjournment; Relief from default — Terms of opening default.

Upon the presentation, at the call of a case in the Municipal Court, of an affidavit by defendant's attorney that he is then actually engaged in the Supreme Court, Kings county, in a named case the trial of which would take all day, an adjournment of the Municipal Court action is a matter of legal right.

Where the court, upon refusing the request for the adjournment, orders an inquest and judgment is entered in favor of the plaintiff, the imposition of terms upon opening defendant's default is erroneous, and an order so made is appealable.

APPEAL from an order of the Municipal Court of the city of New York, fourth district, borough of Manhattan, granting defendant's motion to open his default, upon the payment of ten dollars costs.

Abraham Oberstein, for appellant.

David Kornblueh, for respondent.

GILDERSLEEVE, J. Upon December 5, 1906, the day to which the above entitled action had been adjourned, the clerk of the defendant's attorney appeared upon the call of the case and presented an affidavit made by defendant's attorney to the effect that said attorney was then actually engaged in Trial Term, Part 1, Supreme Court, Kings county, in a case (naming it) which on the day before had been reached on the call calendar of that court and that defendant and his witnesses had waited to be assigned to a trial

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part, and would be so assigned on December fifth, and that the trial would take all day. The clerk also stated that he had been in telephonic communication that morning with said attorney and that he was actually engaged in the trial of said action and asked that the case be adjourned pending such engagement of defendant's attorney. The court refused such request and ordered an inquest which was taken and judgment rendered and entered in favor of the plaintiff for the amount claimed by him. Subsequently a motion was made to open the defendant's default, when the foregoing facts were made to appear. The motion was made upon an order to show cause; and the order appealed from is dated December 19, 1906, and recites that "this motion is granted and the action is set down for the 24th day of December, 1906, upon condition, however, that the defendant pay to the plaintiff or his attorney the sum of $10 costs of this motion, on or before the *21st day* of December, 1906, otherwise the said motion is denied." The figure 1 in the order had clearly been written in ink over the typewritten cipher in the figure 20, thus making the time in which to comply therewith the twenty-first. The endorsement upon the moving papers, evidently made by the justice, differs from the order above mentioned by requiring the payment of the ten dollars costs by the defendant on or before "*the 20th inst.*"; and it is claimed by the appellant that the order was served on the twentieth of December, but not in time to enable him to comply with the terms thereof. It will be observed that the order does not vacate the judgment and provides that, unless the ten dollars costs was paid within the time limit, the motion is to be denied. It is quite clear that the court erred in refusing an adjournment upon the grounds stated by the defendant. The affidavit presented to the court by the defendant's attorney showed an actual engagement in the Supreme Court of Brooklyn, both sides in that case in that court having answered "ready" and being present in court with their witnesses. The defendant was therefore entitled to an adjournment as a matter of legal right. Marsh v. Nassau Show Case Co., 26 Misc. Rep. 837. The court was likewise in

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error in imposing terms as a condition for opening the default. Marsh v. Nassau Show Case Co. *supra*. It is urged by the respondent that the order is not an appealable one. We do not agree with this contention. The Municipal Court Act provides that orders specified in the four sections preceding section 257 may be appealed from as from a judgment, making an exception only in the case of an order "opening a default and vacating a judgment entered thereon." The two requisites of such an order are the opening of the default and the vacating of the judgment. The legislative intention that both essentials must be complied with is made clear by section 258, which provides the only terms that can be imposed as a condition for the opening of a default, and none of those terms permit the judgment to remain as a lien during the pendency of the action.

The order made herein must be modified by opening the default without the payment of costs in the court below and as modified affirmed with costs to the appellant in this court.

GIEGERICH and ERLANGER, JJ., concur.

Order modified and as modified affirmed with costs to appellant in this court.

ANNIE CAINEN, Respondent, *v.* THE NEW YORK CONTRACTING COMPANY, Appellant.

(Supreme Court, Appellate Term, April, 1907.)

Municipal Courts — Procedure — Relief from default.

Where, in a Municipal Court action, the name of the corporation defendant is not correctly stated in the summons and complaint served, and defendant, relying upon the advice of counsel, does not appear, its motion to open the default should be granted upon terms, it appearing by its proposed answer attached to the moving papers that it has a good and substantial defense upon the merits.

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APPEAL by the defendant from an order of the Municipal Court of the city of New York, eighth district, borough of Manhattan, denying a motion to open its default.

James A. Deering (J. C. Toole of counsel), for appellant.

Files & Reese (Harry L. Brooks of counsel), for respondent.

GIEGERICH, J. This action was brought against the New York Contracting Company for a personal injury claimed to have been caused by the negligence of the defendant, which the complaint alleges is a foreign corporation. The summons and complaint were served on one Frederick R. Killeen. It appears from the record that no such corporation as the New York Contracting Company, either foreign or domestic, is known; that there are two existing corporations, the "New York Contracting Company, Pennsylvania Terminal," and the "New York Contracting Company, New Haven Improvements," and that Mr. Killeen is secretary of both; that these corporations had been previously advised to ignore papers in which the defendant was described as "New York Contracting Company," and that accordingly no appearance was made in this action. A judgment was entered against the defendant in default of its appearance and it subsequently moved to open such default, which motion was denied and the defendant has appealed to this court. The justice, in denying the motion, did not write an opinion and we are at a loss to understand upon what ground the denial was placed. It is urged by the respondent that, since the appellant wilfully and deliberately disregarded the summons, it is not entitled to any relief at our hands. Until the decisions in Stuyvesant v. Weil, 141 N. Y. 421, and Holman v. Goslin, 62 App. Div. 204, were announced, it was generally regarded as the law of this state that a judgment could only be enforced against the person or property of the individual named. Farnham v. Hildreth, 32 Barb, 297; Schoellkopf

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v. Ohmeis, 11 Misc. Rep. 253. The first two cases, however, hold that the object of the summons is to apprise the party defendant that the plaintiff in the action seeks judgment against him; and, when it fairly appears that he is apprised of the fact that he is the party intended to be served, the court acquires jurisdiction to render judgment in the action. That the attention of the counsel who has had charge of this case for the defendant was not called to these later decisions is evident from the following allegation of his moving affidavit, viz: "That the fact that the defendant was incorrectly described in the summons and complaint herein as a foreign corporation and by an incorrect name was considered by the legal adviser of said defendant so misnamed and described as sufficient warrant for failing to pay any attention to said summons and complaint; and deponent believes that the allegation in said complaint stating that the defendant is a foreign corporation and the failure to set out correctly the name of any corporation did relieve the New York Contracting Company, Pennsylvania Terminal, from the necessity of appearing in response to said summons and as deponent is informed said corporation was so advised." It is thus shown that the failure to appear was not caused by any desire to impede the plaintiff in collecting her claim, but was based on an honest reliance on the advice given to the effect that such appearance was unnecessary and that no proceedings could be taken for the enforcement of the judgment against the defendant. Instances are not rare in the books where relief has been afforded from defaults, although intentional, where they occurred through a mistake of counsel as to the best form of presenting a defense (Arnold v. Norfolk & New Brunswick Hosiery Co., 19 N. Y. Supp. 957, 47 N. Y. St. Repr. 362), or even through the ignorance or incompetency of counsel (Gideon v. Dwyer, 17 Misc. Rep. 233; affd., 7 App. Div. 608), and meritorious grounds for the application are shown.

From a consideration of the record, we think that the defendant has shown a reasonable excuse for the default and that it has a good and substantial defense upon the merits,

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as appears by its proposed answer annexed to the moving papers.

We are, therefore, of the opinion that, notwithstanding the intentional default, the defendant should have been given an opportunity to present its defense in court, upon terms which would have indemnified the plaintiff for the expense to which she had been put and the delay she had suffered.

The order should, therefore, be reversed and the motion granted, with costs to the appellant to abide the event, provided it pay, within five days after service of notice of entry of the order hereon, the taxable costs and disbursements to date of the plaintiff in the court below.

GILDERSLEEVE and ERLANGER, JJ., concur.

Order reversed and motion granted with costs to appellant to abide event, provided it pay, within five days after service of notice of entry, the taxable costs and disbursements to date of plaintiff in court below.

SAMUEL KNOBLOCH, Respondent, *v.* ABRAHAM TAUBE, Appellant.

(Supreme Court, Appellate Term, April, 1907.)

Case — Settlement — Who may settle — Judge who tried case though transferred to another court.

A motion to resettle the case, on appeal from a judgment of the City Court of the city of New York so as to permit an excluded exhibit to be inserted therein, must be made before the justice who tried the case, though in the meantime he has been sworn in as a justice of the Supreme Court.

APPEAL from an order of the City Court of the city of New York denying defendant's motion for a resettlement of the case.

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Abraham S. Weltfisch (Edward W. S. Johnston, of counsel), for appellant.

Julius Miller, for respondent.

ERLANGER, J. This action was brought to recover broker's commissions and was tried before Mr. Justice Seabury and a jury. During the course of the trial counsel for defendant offered in evidence a certain contract alleged to have been made by the defendant and which had a certain bearing on the issue. The document was excluded, whereupon counsel stated "There is an assignment on the contract to the effect that the same party assigned it to Mr. Rosenberg and we want to show that in pursuance of that assignment we delivered the deed in question which I think we have a perfect right to show." Plaintiff's counsel objected on the ground "that no matter what the contract shows, the deed in evidence, which is undisputed, shows that the property was sold to Mr. Rosenberg." The Court: "I sustain the objection at this time and note your exception. Exception to defendant." The contract was not marked for identification. Judgment was entered for plaintiff from which the defendant appealed. In preparing the case on appeal the substance of the excluded agreement was set forth, but was stricken from the proposed case. The trial justice resigned shortly before he assumed his duties as a justice of the Supreme Court, and a motion was made to resettle the case before a justice of the City Court sitting at chambers who was a stranger to the proceeding. The motion was denied by him and from the order entered on such denial this appeal was taken. The proper course for the appellant to have pursued was to move before Mr. Justice Seabury for a resettlement, and upon denial of such application an appeal could have been taken to this court. The justice before whom the case was tried, though no longer a member of the City Court, has full power to resettle the case, and to permit the excluded exhibit to be inserted therein. Code, § 25; Matter of Mayor, etc., 139 N. Y. 140–143.

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The order must be affirmed, with costs, without prejudice to a renewal of the application before the justice before whom the action was tried.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Order affirmed, with costs, without prejudice to a renewal of application before the justice before whom the action was tried.

CHARLES DUNNE, Appellant, *v.* JOSEPHINE R. ROBINSON, Respondent.

(Supreme Court, Appellate Term, April, 1907.)

Bill of particulars — Effect of bill — Effect as limiting the party's claim — Entirety of contract.

Contracts — Performance of contracts: Sufficiency of performance in general — Contracts with architects; Rights accruing on partial performance of contract — Waiver of failure to fully perform.

Where, in an action to recover a balance due for services as an architect, the bill of particulars contained but a single item for plans, specifications, applications and permits for the defendant's premises, it is manifest that plaintiff elected to make the drawing of the plans an entire contract; and it appearing from the testimony that a set of plans for a fifty-foot building was prepared as a substitute for an old set for a twenty-five-foot building, no recovery may be had for preparing the first set though, in response to an inquiry by the trial justice, counsel stated, contrary to the bill of particulars, that plaintiff's claim was for drawing two sets of plans.

Where defects and omissions run through the entire system of plans furnished by an architect so that they are useless for the guidance of builders, the architect is not entitled to any compensation therefor.

Payment on account of the alleged services made without knowledge of the defective character of the plans did not constitute either an acceptance of the plans or waiver of defects.

APPEAL by the plaintiff from a judgment of the Municipal Court of the city of New York, twelfth district, borough

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of Manhattan, rendered in favor of the defendant, after a trial before the court, without a jury.

Kramer, Bourke & Koch, for appellant.

Samuel H. Wandell, for respondent.

GIEGERICH, J. The action is to recover the sum of $500, a balance claimed to be due the plaintiff for services as an architect in preparing plans for a store and loft building to be erected upon the defendant's land, situate at Nos. 18 and 20 West Twenty-first street, in the borough of Manhattan. The pleadings were oral and the defendant pleaded a general denial, payment and a breach of contract. The plaintiff was at first employed to draw plans for a twenty-five-foot building; but the defendant, having acquired title to the adjoining parcel, later retained him to prepare plans for a larger building, of fifty feet frontage. It is claimed by the plaintiff that compensation for preparing the set of plans for the twenty-five-foot building should have been awarded by the trial justice. In support of such contention plaintiff urges that it was stated by his counsel upon the trial, in response to an inquiry by the trial justice, the claim was for drawing two sets of plans, but this theory of the action is contrary to the bill of particulars furnished by the plaintiff on the defendant's demand, and therefore it cannot prevail. Dananberg v. Reinheimer, 24 Misc. Rep. 712. The bill of particulars reads, as follows:

"June 20, 1906. Plans, specifications, applications and permits for premises 18–20 West 21st St.	$600 00
Received on account	100 00
"Balance	$500 00"

There is thus no claim for preparing two separate sets of plans, nor are particulars furnished of two items. Moreover, the complaint, which, as seen, was oral, was stated to

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be for a "balance due for services rendered as architect," thus distinctly showing that recovery was sought on only one cause of action. The plaintiff introduced in evidence but one set of plans and they related to a fifty-foot building, and it is apparent from the evidence that such plans were prepared and filed in substitution for the old plans for the twenty-five-foot building. In view of all these circumstances, as well as plaintiff's failure upon the trial to move for judgment in his favor for preparing plans for a twenty-five-foot building, it is manifest that he elected to make the drawing of all the plans one transaction, in other words, an entire contract. The case having been tried on that theory, it is now too late for the plaintiff to claim that he is entitled to compensation for preparing plans for a twenty-five-foot building. Harris v. Gunn, 37 Misc. Rep. 796, and citations; Dananberg v. Reinheimer, *supra*. There was ample evidence introduced upon the trial to warrant the justice in finding that the plans so prepared and put in evidence by the plaintiff were defective and utterly unfit for use. No dimensions were noted on them, and the figures and scales did not correspond, and they were full of omissions and inaccuracies. The plaintiff himself admitted that his plans were incomplete, and it appears from the testimony of expert witnesses called by the defendant that such plans could not be used by a builder. The plaintiff further admitted that this was his first large job; that he had previously drawn plans for alterations only and had never drawn plans from which a building was constructed. It furthermore appears from the evidence that he was also engaged in the iron business; that he had lately been an inspector in the building department; that he was not a member of the Institute of Architects, and that he had had but very slight experience in architectural work. In volume 6 of Cyclopedia of Law and Procedure (p. 34), it is stated that: "The undertaking of an architect implies that he possesses skill and ability, including taste, sufficient to enable him to perform the required services at least ordinarily and reasonably well; accordingly he must exercise in any given case his skill and ability, his judgment and his taste reason-

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ably and without neglect." In the same work (at p. 35) it is stated that, if the architect prepares specifications, they should be in detail. It is urged by the plaintiff, however, that, although the defendant may have shown that by reason of the plaintiff's lack of skill in the preparation of the so-called fifty-foot plans the same were defective, such defects could not defeat all recovery by him in this action. Hubert v. Aitken, 5 N. Y. Supp. 840, is cited in support of the position so contended for, but that case is clearly distinguishable from the present one. There the action was for drawing plans and supervising the erection of a building, and the court held that with regard to the plans the contract was fully completed. Drawings for the whole building were furnished, and it was actually constructed in accordance therewith. After the building was finished, it was discovered that chimney flues connecting with the boiler flues were not enough for the purpose they were designed. The flues, however, were not omitted from the plans. On the contrary, they were set out in detail. The court stated that it could not be said that the plaintiffs did not completely perform their contract, although they performed it negligently. In the earlier report of the same case (2 N. Y. Supp. 711), it was held that the cost of correcting the defect in the chimney, discovered after construction, should be deducted from the architect's demand, and this view was sustained in the later decision of the case. 5 N. Y. Supp. 713. It is difficult to construe such a decision as an authority for the argument of the plaintiff that plans so defective and incomplete as these were shown to be, and containing such omissions of necessary information that they could not be used by a builder, should be paid for *pro rata,* in the proportion that defective plans bear to perfect ones. The true rule would seem to be laid down in Moneypenny v. Hartland (1 Car. & P. 352, also 2 id. 378), and cited with approval in the first report of Hubert v. Aitken, *supra,* where a surveyor's estimates for work were grossly incorrect and it was held that he was not entitled to recover for his services. The case of Woodward v. Fuller, 80 N. Y. 312, likewise cited by the plaintiff, is also distinguishable. There, the

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plaintiff substantially performed a contract for alterations of a house, but some of the specifications were not complied with, in slight particulars, all such defects being easily remedied; and it was held that the plaintiff could recover the contract price, less damages, the court expressly stating that the rule would be otherwise if the defects pervaded the whole work and were essential, whereby the object of the parties might be defeated. As above shown, the defects and omissions complained of in the present case run through the entire system of plans furnished by the plaintiff, so that they were useless for the guidance of builders. Under the rule above stated, the plaintiff is not entitled to any compensation therefor. While it appears from the evidence that the defendant paid $100 on account of the plaintiff's alleged services, it was also shown, without contradiction, that such payment was made without knowledge of the defective character of the plans and hence there was no acceptance or waiver of defects. Cahill v. Heuser, 2 App. Div. 292; 6 Cyc. 69.

I am of opinion that the justice made a proper disposition of this case, and it should, therefore, be affirmed, with costs.

GILDERSLEEVE and ERLANGER, JJ., concur.

Judgment affirmed, with costs.

CORINNE PARKER, Respondent, *v.* THE HYDE & BEHMAN AMUSEMENT COMPANY, Appellant.

(Supreme Court, Appellate Term, April, 1907.)

Contracts — Performance of contracts — Contracts to be performed to satisfaction of other party — Contracts with artists or actors.

Where plaintiff agreed to render satisfactory services in her specialties at two performances each day for the period of one week and after one performance, consisting of singing and dancing, she is in good faith discharged because her services are unsatisfactory, a judgment in her favor for a full week's salary is unwarranted and erroneous.

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APPEAL by the defendant from a judgment of the Municipal Court of the city of New York, sixth district, borough of Manhattan, rendered in favor of the plaintiff after a trial before the court without a jury.

J. S. & H. A. Wise, for respondent.

Hirsh & Rasquin (Fred W. Buermeyer of counsel), for appellant.

GIEGERICH, J. The action was brought to recover the sum of $250, being the amount provided in the contract for the plaintiff's services under a theatrical engagement with the defendant. The agreement was in writing, dated November 2, 1905, for a term of one week commencing November 20, 1905; and by its terms the plaintiff agreed "to render satisfactory services in her specialties at two performances each day" of the week in question. The contract was on a printed form with the blanks filled in. Among the words so written in the blank spaces is the word "satisfactory." The contract contains some provisions in the printed portions thereof which were apparently intended for engagements of a longer duration than the one in suit, one of such being the provision that the stipulated payment per week shall be "payable at the end of each and every week from the time this contract goes into effect." There is another provision "that either party shall have the right to cancel and terminate this contract by giving two weeks' written notice of their intention so to do to the other party interested." The plaintiff gave one performance under her contract, consisting of singing and dancing, and was thereupon discharged by the defendant's manager, who, upon the trial, testified that he discharged her in good faith and because her services were not satisfactory to the defendant or the public. It further was shown in evidence that the defendant advertised the plaintiff as one of the leading features on its bill and that, as a result of her discharge, there was a vacancy left on its programme which it had to fill by procuring another act to take its place. Upon the

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entire case I do not think there was room for any conclusion other than that the defendant discharged the plaintiff in good faith and because her services were unsatisfactory. In Crawford v. Mail & Express Pub. Co., 163 N. Y. 404, the plaintiff had been engaged to write for a newspaper so long as his services should be "satisfactory to the publishers;" and it was held that the employment was not that of an ordinary servant to perform work of a business or commercial nature, but rather an employment to prepare articles in the line of the policy of the paper and that, inasmuch as there was no provision in the contract in any manner limiting the publishers in the exercise of their judgment as to what was satisfactory, they were at liberty to discharge him if his services were unsatisfactory for any reason. In Smith v. Robson, 148 N. Y. 252, which was a case of a contract of theatrical employment, reserving to the employer the right to discharge in the event that he should "feel satisfied" that the employee was "incompetent to perform the duties which he had contracted to perform," the court held that, if the defendant had shown to the satisfaction of the jury that he was acting in good faith in discharging the plaintiff because he was dissatisfied and that his action was not arbitrary and capricious, he could not have been held liable. In the present instance we think that the defendant established the facts just referred to and that the judgment in favor of the plaintiff was unwarranted and erroneous. There were a number of errors committed by the trial justice in excluding or striking out evidence offered or given on behalf of the defendant, but it is unnecessary to make detailed reference to them. It is claimed, in support of the judgment, that the provision making the salary "payable weekly, at the end of each and every week from the time the contract goes into effect," indicates that the parties contemplated a continuing engagement and that the defendant could discharge the plaintiff only on giving the two weeks' notice elsewhere required in the contract, citing Fisher v. Monroe, 2 Misc. Rep. 326; Gallo v. Mayor, 15 App. Div. 61; De Vere v. Gilmore, 25 Misc. Rep. 306; but we think it is manifest without argument that there is no good

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ground for any such claim. The contract by its terms was for a period of one week and, consequently there is no applicability to this case of decisions like Fisher v. Monroe, *supra*, holding that the employer is at liberty under such an agreement to discharge the employee at any time on payment of two weeks' salary in advance. Mere reference to the consequences of such an argument is sufficient to refute it and to show that the parties could not have intended any such consequences or have had any such meaning.

The judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

GILDERSLEEVE and ERLANGER, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

SIMON D. HEINEMANN and RICHARD SCHLOSS, Respondents, *v.* BERTHA BRASCH and LEO JACOBI, Appellants.

(Supreme Court, Appellate Term, April, 1907.)

Principal and surety — Remedies of creditor — Necessity for demand on surety.

Bonds — Breach — What constitutes breach.

An action cannot be maintained upon the contract of a surety, who agrees to make good upon demand up to a certain amount, any loss on account of misappropriation of funds collected by his principal, until a demand has been made.

APPEAL from a judgment of the City Court of the city of New York against the defendants, entered upon the verdict of a jury, and from an order denying a motion for a new trial.

Henry Goldstein, for respondents.

Joseph C. Kadane (Solomon De Young, of counsel), for appellants.

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GIEGERICH, J. The action is brought upon the following undertaking:

"Know all men by these presents, that we, Leo Jacobi and Bertha Brasch, are hereby held and firmly bound unto Heinemann & Co. in the sum of five hundred ($500) dollars, lawful money of the United States, to be paid to the said Heinemann & Co., their executors, administrators or assigns; for which payment, to be made, we bind our heirs, executors and administrators firmly by these presents. Sealed with our seals, Dated the twenty eighth day of February nineteen hundred and three. The condition of the above obligation is such, that if the above bounden Leo Jacobi shall misappropriate any of the funds of the said Heinemann & Co., we, or our heirs, executors and administrators, shall pay or cause to be paid unto the above named Heinemann & Co., their executors, administrators or assigns, the sum of Five Hundred Dollars ($500) or less on demand, to make good any loss to them on account of said misappropriation.

"Witness our hands and seals this twenty-eighth day of February, 1903.

"LEO JACOBI [L. S.] BERTHA BRASCH [L. S.]"

It was shown upon the trial that Jacobi had failed to account for various sums collected by him and judgment was rendered for the aggregate of the sums so misappropriated. On behalf of the defendant surety, it was urged upon the trial, among other objections, that no demand had been made before suit brought. In support of the proposition that no demand was necessary, the plaintiffs cite Wilson v. Field, 27 Hun, 46; Krause v. Rutherford, 37 Misc. Rep. 382, and Epstein v. United States Fidelity & G. Co., 29 id. 295; but the two former actions were upon the customary form of undertaking given on procuring an order of arrest, while the latter was on the form of such undertaking given on procuring an attachment, neither of which forms of undertaking provides for any demand. In this case, on the contrary, there is an express provision for a demand; and, not only on the general

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rule that the contract of a surety should be construed strictly in his favor, but also because of the nature of this case, such requirement should be enforced. Until demand was made, the surety would have no means of knowing how much the misappropriation amounted to, or, indeed, that there had been any misappropriation. As was said by this court in Packard v. Long Island R. R. Co., 52 Misc. Rep. 98, "when the fact upon which the defendant's liability depends is within the plaintiff's knowledge, notice should be given to the defendant before bringing the action," citing Cole v. Jessup, 2 Barb. 309; Bunn v. Lett, 65 Hun, 43, and Wangler v. Swift, 90 N. Y. 38. The respondent attempts to argue that the failure of the defendant to plead a want of demand was a waiver; but, in the view I take of the contract, the proof of such demand was a part of the plaintiffs' case.

The judgment should be reversed and a new trial ordered, with costs to the appellants to abide the event.

GILDERSLEEVE and ERLANGER, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellants to abide event.

JOHN FINCK, Respondent, *v.* LOUISE PIERCE, Appellant.

(Supreme Court, Appellate Term, April, 1907.)

Damages — Particular contracts and relations — Contracts with agents, brokers and factors.

A recovery for breach of contract must be confined to the actual loss sustained; and, where defendant agreed to pay a broker for procuring a loan upon certain property, but refused to accept the loan, she may, in an action for breach of contract, prove that the broker had agreed to pay the lender one-half of his commission.

APPEAL by the defendant from a judgment of the City Court of the city of New York, in favor of the plaintiff, entered upon the verdict of a jury.

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Sachs & Levy (William Victor Goldberg, of counsel), for appellant.

Steuer & Hoffman (Charles L. Hoffman and Henry A. Friedman, of counsel), for respondent.

GIEGERICH, J. The action was brought upon a paper of which the following is a copy:

"JOHN FINCK, Esq., 141 Broadway, City:

"DEAR SIR: I hereby authorize you to accept on my behalf a mortgage of $20,000 at 5 per cent. for three years or five years, covering my property 117 East 101st Street. I further agree to pay two per cent. and disbursements in the event of your obtaining an absolute acceptance of the amount specified herein. This option is to remain in force until notified. Truly yours,

"(Signed) L. PIERCE."

Upon the trial the plaintiff gave evidence of procuring an acceptance of the loan in the amount and on the terms named, and also of disbursements made in the amount of $20 for procuring appraisals of the property. The defendant's refusal to perform was also shown. The interest was conceded to be $12. The jury brought in a verdict covering the agreed commission of $400, besides the disbursements and interest. The defendant attempted to prove by the plaintiff and by one of the attorneys for the person who was to lend the money that the plaintiff had agreed to pay to the lender a bonus of one per cent. of the $20,000 which was to be paid to his attorneys in the event that the transaction should be consummated. The argument is made that this commission of $200 was saved to the plaintiff by the failure of the defendant to perform and that it should be allowed to the defendant on the amount recoverable, as, otherwise, the plaintiff would be in a better position through the defendant's breach than he would have been through the defendant's performance. As was said by this court in Finck v. Menke, 31 Misc. Rep. 748: "Where a breach

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of contract occurs, the aggrieved party is not always entitled by way of damages to the stipulated compensation. The recovery must be confined to the actual loss sustained. It is fundamental that the plaintiff cannot derive a greater advantage from a breach than from a performance." I am of the opinion that the testimony referred to should have been admitted, not for the purpose of varying the contract between the parties, but for the purpose of showing what amount the plaintiff was entitled to recover on the equitable principle above stated.

The judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

GILDERSLEEVE and ERLANGER, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

WILLIAM G. CLARK, Respondent, *v.* SAMUEL HARRIS, Appellant.

(Supreme Court, Appellate Term, April, 1907.)

Building and construction contracts: Submission of question of performance to third person — Certificate of building department as condition precedent; Extra work — Right to additional compensation for extra work — Necessity of having written authority for extra work.

Contracts — Interpretation of contract — Conditions precedent — Effect of condition precedent and when deemed to have been fulfilled.

Where a contractor abandons his contract and one who was working for him on the job goes on and completes it, at the request of the owner of the premises, and also performs extra work at prices agreed upon, the owner cannot defeat an action to recover the price, where he has written a letter to the plaintiff, at the time of making a payment to him on account, in which he has stated the price and the balance due on account thereof, on the ground that the order for the extra work was not in writing as required by the contract.

And where it appears that the contract required the contractor to produce a certificate from the building department, though the

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defendant had made no objection at any time that such a certificate had not been produced, but that plaintiff had it and told the owner so and produced it upon the trial and offered it in evidence but it was excluded upon the objection of the defendant that it was not binding upon him, a judgment upon a verdict for the plaintiff should be affirmed.

APPEAL from a judgment of the Municipal Court of the city of New York, tenth district, borough of Manhattan, in favor of the plaintiff against the defendant for the sum of four hundred and twenty-five ($425) dollars damages and costs.

Charles B. Harris, for appellant.

James F. Higgins, for respondent.

Per Curiam. The action was brought to recover a balance due on three separate contracts or causes of action, *i. e.*, a general contract for plumbing and gas fitting, $1,450; a contract to furnish two new hot water steel tanks, at an agreed price of $175; and a contract to furnish a new wooden roof tank at an agreed price of $150. The answer was a general denial; that another cause of action is pending between the same parties for the same cause of action; and a counterclaim of $300 for failure to complete work in agreed time. Plaintiff testified that he was performing certain work for a general contractor named Margulies on premises in Orchard street; that, after he had been working about three weeks, Margulies abandoned the contract; that defendant requested plaintiff to carry out the contract and complete it, and said that he, the defendant, would see that plaintiff was paid; and that plaintiff proceeded with the work, and completed it, and was paid on account $1,350. He further claims that he was asked to do some other work by the defendant, and he testified thus: "I had a conversation with him in relation to two steel tanks and one roof tank. Mr. Harris asked me to examine the tank that was on the premises and see if it was fit for use, and I made an examination of the tank and found it was useless and defec-

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tive and could not be used again. He therefore asked me to get him an estimate to provide a hot water tank of the same seize as the present tank. I got him the estimate and he thought the estimate was too high. Q. Did you and he finally agree? A. Yes, I agreed to furnish two hot water steel tanks and connect them for $175. I told him how much I would charge — I told him I would charge $175. He said 'All right, go ahead and get them.' I got them. Q. What about the other tank? A. The water pressure was not heavy enough. I said, 'You will have to provide a roof tank.' He said, 'Give me an estimate on it.' I gave him an estimate and he said 'All right — go ahead and furnish it.' Q. What was the price? A. $150. Q. Did you furnish it? A. I did." And he further testified "I had not been paid anything on account of the two tanks and the balance on the first contract — the whole amount of $425 was due."

The following letter, signed by the defendant, was offered in evidence:

"NEW YORK *Sept 5th*, 1906

"MR. WILLIAM G. CLARK,

"438 West 40th St., N. Y. City

"DEAR SIR.— Enclosed please find check for $350.00, all I can spare for the present time. According to your statement there has been due you, $475.00 contract; $150. (roof) tank and $175.00 (steel) tanks; total $800. Deducting the enclosed check leaving a balance due $450.00

"Kindly acknowledge receipt of same and statement of balance due you according to aforesaid.

"Yours

"S. HARRIS"

The defendant in his testimony denied that he ever asked the plaintiff to perform any extra work, and denied that he at any time had any conversation with him at all about extra work. And his son, who was called as a witness, testified to the same effect and attempted to prove the counterclaim. The defendant also was afterward recalled and gave some evidence in regard to the counterclaim. Plaintiff in

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his testimony admitted that there was a novation, whereby the plaintiff took the place of the contractor, Margulies, and continued to work under the same terms and conditions. The written specifications, which were made part of the contract under which plaintiff testified he worked, provide that no work will be paid for unless ordered by the owner or his agent in writing, and unless prices are agreed upon between the owner, or his agent, and the contractor, in writing; and, in that event, it must be specially stated that the works to be done are extra. Plaintiff, on cross-examination, admitted that he was suing for extra work not provided for in the original specifications, and without any written authorization or order from the defendant, and that he followed the specifications in every particular and was familiar with all their conditions. However, the evidence, to the admission of which no objection was taken, shows that defendant requested plaintiff to do the extra work, and that plaintiff did it. Having ordered the work done and received the benefit of plaintiff's services, defendant can hardly hide behind this provision in the specifications, which was disregarded by defendant as well as by plaintiff. The letter above quoted was a written admission by defendant that he authorized the work. The defendant made no point or objection at any time that a certificate from the building department was not furnished, as required by the specifications; and it appears, at the end of the plaintiff's testimony, that plaintiff had had such certificate and that he told the defendant that he had it, and that the same was offered in evidence, but was excluded upon the defendant's objection that it was not binding on defendant; but no question was raised as to the genuineness of the certificate or that it complied with the requirements of the specifications. There are no errors in the admission or exclusion of evidence of such weight as to require a reversal.

The judgment should be affirmed with costs.

Present, GILDERSLEEVE, GIEGERICH and ERLANGER, JJ.

Judgment affirmed, with costs.

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CHARLES BJORKEGREN, Respondent, v. LEONARD G. KIRK, Appellant.

(Supreme Court, Appellate Term, April, 1907.)

Contracts — Actions on contracts: Sufficiency of complaint — Averments as to performance; Evidence — Admissibility of evidence — Effect of putting contract in evidence — Disclosure of condition precedent.

Saving questions for review — Motions — Necessity — Necessity of motion to dismiss.

In an action upon a building contract to recover the contract price, where the complaint does not set out the contract in full and it appears, upon the production of the contract at the trial, that an architect's certificate is a condition precedent to the right of the contractor to require payment, the plaintiff cannot prove the unreasonable refusal of the architect to give a certificate which he has not pleaded.

Where the introduction of such proof was objected to by the defendant and an exception taken to its admission, the complaint cannot be thereafter amended to conform to the proof.

The omission of the defendant to move for a dismissal of the complaint at the close of the whole case is not a waiver of his right to maintain that evidence, to the admission of which objection and exception were duly taken, was incompetent and inadmissible.

APPEAL by the defendant from a judgment of the City Court of the city of New York entered in favor of the plaintiff after a trial before the court and a jury, and also from an order denying defendant's motion for a new trial.

William Steele Grey (James E. Duross of counsel), for appellant.

J. Homer Hildreth (George H. Taylor, Jr., of counsel), for respondent.

ERLANGER, J. This action was brought to recover a balance alleged to be due the plaintiff on a building contract,

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for extra work done on the building and for the services of a watchman. The contract was made between the plaintiff and one Stone, acting for the owner, the defendant herein. The contract was not made a part of the complaint, and there was nothing alleged therein from which it could be said that the contract provided for the production of an architect's certificate as a prerequisite to the plaintiff's right to receive payments due under the contract, nor did the complaint allege that such a certificate had been obtained or had been unreasonably refused. It did allege "that the plaintiff duly completed the job mentioned in said contract in accordance therewith and thereby became entitled to the full compensation or contract price mentioned therein." At the opening of the trial the defendant's attorney moved to dismiss the complaint upon the ground that the complaint did not allege that the architect's certificate was unreasonably withheld or refused. This motion was denied and an exception taken. In the then state of the case this ruling was undoubtedly correct, as there was nothing in the case to show that such certificate was required. The plaintiff soon after the taking of testimony was begun introduced the contract in evidence. It then appeared that the contract contained a clause providing that the work should be done under the direction and to the satisfaction of the owner and architect, and "all payments shall be made upon written certificate of the architect to the effect that such payments are due." The respondent's attorney admits in his brief that in order to recover "the plaintiff would be obliged to to show either that he had an architect's certificate for the last payment, or that there was a wrongful withholding and refusal of such certificate by the architect." Evidence of the refusal of the architect to give such certificate was given, and the appellant claims that a proper and timely objection was made to the introduction of such evidence, while the respondent urges that no objection was made thereto by the defendant and this is the pivotal point upon which the decision herein must turn. The plaintiff testified without objection as follows: "Mr. Gillam (the architect) said everything seems to be all right, you seem to have done every-

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thing that is to be done. I asked him for a certificate." The defendant's counsel then said: "I object to this, the plaintiff has not laid a foundation for this in his pleadings. Objection overruled. Exception taken." Without further objection the plaintiff then testified that the certificate was refused him by the architect, the architect stating: "He could not give it without Mr. Kirk said so." The plaintiff also submitted evidence from which the jury subsequently found that he had substantially performed the work under the contract. We are of the opinion that such objection was well taken and that testimony offered thereafter by the plaintiff in an attempt to prove a fact essential to his recovery and which should have been set forth in his pleadings was error that requires a reversal. It has been repeatedly held that, an objection having been once taken and overruled and exception taken thereto, it was not necessary to repeat the objection and exception to the same class of evidence when subsequently offered. The objection and exception already taken apply thereto and the omission to repeat them is not a waiver. Dilleber v. Home Life Ins. Co., 69 N. Y. 256; Church v. Howard, 79 id. 415; Carlson v. Winterson, 147 id. 652; Lyons v. New York El. R. Co., 26 App. Div. 59. At the outset of the trial the plaintiff had warning, by motion to dismiss, that his pleading was defective, if he intended to rely upon an unreasonable refusal of the architect to give the requisite certificate. Immediately after testimony pointing to an endeavor on the part of the plaintiff to offer such incompetent evidence had been given, the defendant again interposed an objection which was overruled and an exception thereto taken in which objection the plaintiff's attention was specially called to the fact that testimony of the kind offered was not within his pleading. The plaintiff was, therefore, fully informed of the position taken by the defendant and of the defective condition of his complaint and the incompetent character of the evidence sought to be adduced thereunder. He made no motion, however, to amend. We think, therefore, that the objection of the defendant was seasonably and timely made and that it cannot be said that the testimony given thereafter showing that the architect's

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certificate was demanded and unreasonably refused was admitted without objection. It is urged that the pleadings may be made to conform to the proof upon this appeal and the judgment sustained, and we are cited to the case of Smith v. Wetmore, 41 App. Div. 290–292, where such a course was taken under similar circumstances. The Court of Appeals in considering that case (167 N. Y. 234) did not pass directly upon the right of the lower court to permit such an amendment to be made upon appeal, but put their affirmance upon another ground. It has often been held that a motion made after the close of the evidence to conform the pleadings to the proof cannot be granted where the admission of the evidence is objected to on the ground that it did not support the allegations of the complaint. Charlton v. Rose, 24 App. Div. 585; Bossert v. Poerschke, 51 id. 381. In this last case it was said, citing Rutty v. Consolidated Fruit Jar Co., 52 Hun, 492, and Barnes v. Seligman, 55 id. 339, that the power to thus amend is never to be exercised where the facts have been proven over the objection and exception of the party against whom they are offered; that such an amendment is allowable only where the proof has been admitted without objection and the attention of the party offering the evidence has not been called to the defect in the pleading. The case of Smith v. Wetmore, *supra*, was referred to and it was said that in that case the "fact seems to have been overlooked that the evidence when offered was objected to; or, what is more probable, it is likely that the objection to the evidence was not put upon the ground that the excuse for not giving the certificate had not been pleaded." See also Romeyn v. Sickles, 108 N. Y. 650. It is also urged that the defendant's failure to move for a dismissal at the close of the whole case precludes him from now asserting that the facts proven do not sustain the verdict. There can be no doubt that, by a failure to make such a motion, a defendant concedes that there is a question of fact for the jury, but he does not thereby admit more than that upon the admitted testimony there is such a question, and does not thereby waive his right to maintain that such evidence was incompetent and

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inadmissible when he has saved his right to thus criticise the admission of such testimony by timely and proper objection. There must be a new trial.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

ROSIE KANEVSKY, Respondent, *v.* THE NEW YORK, ONTARIO & WESTERN RAILWAY CO., Appellant.

(Supreme Court, Appellate Term, April, 1907.)

Carriers — Carriage of baggage and passenger's effects — In general — Limiting liability — Power of agent of passenger.

Where the plaintiff's son, fifteen years of age, is intrusted with the duty of preparing her trunk for shipment and attending to checking it and he packs the trunk and binds it with a thick cord, he will be regarded as having authority to sign a release of liability reciting that the lock was off the trunk and the plaintiff will be bound thereby though he testifies that the trunk was in good order and that it was locked and that he did not read the paper he signed; that "everybody else signed it who rode" and that no explanation was made when it was presented to him.

APPEAL by the defendant from a judgment of the Municipal Court of the city of New York, eleventh district, borough of Manhattan, in favor of the plaintiff after a trial had before the justice, without a jury.

A. Welles Stump, for appellant.

S. C. Sugarman, for respondent.

GIEGERICH, J. The action was brought for damage and loss of baggage checked by the plaintiff over the defendant's road from Centerville, N. Y., where the plaintiff was spending the summer, to New York city, where she resided. The

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trunk containing the baggage was packed by the plaintiff's son, then a boy about fifteen years of age, and was then bound with a thick cord by him. When the party, which included the plaintiff, her son and another child, reached the station, the plaintiff, after purchasing tickets, sent her son to the baggagemaster to attend to checking the trunk. The baggagemaster presented to him and received his signature upon an agreement releasing the company from all liability for the baggage in question, such agreement stating that the lock was off the trunk. The plaintiff and her son and her daughter all swore positively that the trunk was in good order and that it was locked, and the son further swore that he did not read the paper that was presented to him for signature; that "everybody else signed it who rode" and that no explanation was made when it was presented to him. The defendant offered records kept by its various employees, showing that the article of baggage in question was marked in such records as being in bad condition from the start, such records including the one kept by the agent who had charge of the baggage car on which the trunk was placed at the station from which it was checked. But, without considering any of those records, we think the fact of the release of liability reciting that the lock was off the trunk is sufficient to determine the issue of credibility in favor of the defendant. It is difficult to conceive why such a paper should have been prepared if the trunk had been in good condition as the plaintiff and her children testified when it was delivered at the station. Moreover, the release of liability was signed by the person whom the plaintiff had entrusted with the duty of preparing the trunk for shipment and of attending to checking the same. The fact that her son was a minor did not incapacitate him from acting as an agent, the well-known rule being that contracts made by an infant as an agent are binding upon the principal. 1 Am. & Eng. Ency. of Law (2d ed.) 945; Avery v. Fisher, 28 Hun, 508. "The agent to whom the owner trusts goods for delivery must be regarded as having authority to stipulate for the terms of transportation." Redf. Carriers, § 52. See also Nelson v. Hudson R. R. R. Co., 48 N. Y. 498; Shelton v. Merchants

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Disp. Trans. Co., 59 id. 258; Root v. New York & N. E. R. R. Co., 59 N. Y. St. Repr. 613; Jennings v. Grand Trunk R. Co., 127 N. Y. 438; Steers v. Liverpool, N. Y. & P. S. S. Co., 57 id. 1; Zimmer v. N. Y. C. & H. R. R. R. Co., 137 id. 460.

GILDERSLEEVE and ERLANGER, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

GUSTAVE KAHL, Appellant, *v.* THE NEW YORK CITY RAILWAY COMPANY, Respondent.

Nos. 13 and 14.

(Supreme Court, Appellate Term, April, 1907.)

New trial — Grounds — Verdict or findings contrary to law or evidence — Verdict contrary to evidence — Credibility of witnesses. Case — Interpretation — Consideration of matters outside of record in general — Record on appeal in another action.

Where the plaintiff's cause of action is supported only by his own testimony but there is no inherent improbability in his story and he is not contradicted, impeached or discredited, the jury may not disregard his testimony and find a verdict for the defendant.

The court in reviewing a judgment upon appeal cannot consider the record in another action unless offered and legally received in evidence in the case under review.

APPEAL by the plaintiff from a judgment in favor of the defendant rendered in the Municipal Court of the city of New York, third district, borough of Manhattan.

Harcourt Bull, for appellant.

James L. Quackenbush, for respondent.

Per Curiam. The facts in these cases are substantially the same except as to the date of refusal of transfers as in

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the case of Kahl v. New York City R. Co., reversed by this court in November, 1906. We are asked, however, by the respondent herein to defer our decision in these cases for the following reasons set forth in the brief of counsel: "Nine cases of this same plaintiff against the same defendant for similar causes of action were disposed of at one time by Justice Moore. Previous to this in November an appeal was taken in one of the cases and argued at the November Term. In two of these actions the defendant introduced testimony of conductors, substantiated by day cards with a record of the hours at which they made their trips, the number of the car of which they were in charge and the route of the trips, absolutely contradicting the plaintiff as to the times at which he stated and testified from his record that he made the trip, as to the car numbers and conductors' numbers. The plaintiff did not bring on all these appeals to be heard, but has selected the ones in which such testimony did not appear, although the justice at the time he determined the case stated that if he found that he had testified falsely in one case he would not credit his testimony in any case as it was uncorroborated. All of the nine cases are appealed to this court. As the justice determined them in the light of the testimony as brought out at that time in all the cases, it is submitted that this court in passing upon the same cases should have before it all the testimony and that this may be done by presenting the records in the remaining cases before this court at the next term; that if the cases are not brought on for argument at the next term by the plaintiff, the defendant will bring them on." It will be seen that no claim is made that all the cases were tried as one or that the testimony offered and received in the two cases referred to was by consent or otherwise made a part of the other cases, and we are asked to take the record of facts proven in those two cases as a basis for determining cases which do not contain those facts in evidence. This we cannot do. Each record must be complete in itself, and the record in one action cannot be considered in another unless the same has been regularly offered and legally received in evidence in the case in which it is sought to be made a part

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thereof. There is no inherent improbability in the plaintiff's story; he was not contradicted, impeached or discredited. Lewis v. New York City R. Co., 50 Misc. Rep. 535.

Present, GILDERSLEEVE, GIEGERICH and ERLANGER, JJ.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

JOHN KERIN, Appellant, *v.* THE NEW YORK CITY RAILWAY COMPANY, Respondent.

(Supreme Court, Appellate Term, April, 1907.)

Evidence — Weight and sufficiency — Preponderance.

In a civil action to recover a penalty the plaintiff rests under the burden of proving his case by a preponderance of evidence only, and not beyond a reasonable doubt.

APPEAL by the plaintiff from a judgment of the Municipal Court of the city of New York, third district, borough of Manhattan, entered upon the verdict of a jury in favor of the defendant.

Harcourt Bull, for appellant.

James L. Quackenbush (Henry F. Gannon of counsel), for respondent.

GIEGERICH, J. This action was brought to recover a penalty under the provisions of sections 39, 101 and 104 of the Railroad Law (L. 1890, chap. 565), for an alleged refusal by the defendant to issue to the plaintiff a transfer over various of its street railway lines in the borough of Manhattan, on April 26, 1906. The answer was a general denial.

The action was tried before a jury and at the trial, after he had delivered his main charge, the justice was requested by the defendant's counsel to charge as follows: "I ask

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your honor to charge the jury that in a penal action of this kind the laws of evidence require that the plaintiff prove his case, not by a preponderance of evidence as in an ordinary negligence case, but beyond a doubt, as in a penal case;" and the court said, "I so charge, beyond a reasonable doubt," to which the plaintiff's counsel noted an exception.

It ought hardly be necessary to cite any authorities to show that such instruction is erroneous. The decisions in the recent cases of Kurz v. Doerr, 180 N. Y. 88; Wood v. Wyeth, 106 App. Div. 21, settle the rule conclusively that in a civil case the plaintiff rests only under the burden of proving his case by a preponderance of evidence, and not beyond a reasonable doubt.

GILDERSLEEVE and ERLANGER, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

ABRAHAM LUDINSKY, Appellant, *v.* THE NEW YORK CITY RAILWAY COMPANY, Respondent.

(Supreme Court, Appellate Term, April, 1907.)

Carriers — Carriage of passengers — Liability for personal injuries to passengers — Actions by passengers for personal injuries — Sufficiency of evidence as to negligence.

Where a street car approaches a curve at a rapid rate and is derailed, negligence upon the part of the company is inferable.

APPEAL by the plaintiff from a judgment of the Municipal Court of the city of New York, thirteenth district, borough of Manhattan, dismissing the complaint for failure of proof.

Alexander Kahn, for appellant.

William E. Weaver, for respondent.

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GIEGERICH, J. The action was brought to recover damages for personal injuries claimed to have been received by the plaintiff while a passenger on the defendant's street car. There was testimony on behalf of the plaintiff that all the seats in the car on which he was riding were occupied and that he accordingly stood upon the rear platform; that the car approached the corner where the track turns from Avenue B into Second street at a rapid rate and at the curve left the track, whereupon the plaintiff was thrown from the platform into the street, receiving the injuries complained of. The court dismissed the complaint for failure of proof, and from the judgment of dismissal this appeal was taken. The defendant's counsel relies upon Hastings v. Central Crosstown R. R. Co., 7 App. Div. 312, to sustain the proposition that the mere fact that a horse car is derailed is not of itself proof of negligence; but, in the more recent case of Hollahan v. Metropolitan St. R. Co., 73 App. Div. 164, the Hastings decision was referred to and it was pointed out that in that case there was evidence, not only of the derailment, but also of its cause, namely, that the driver, when in a dangerous situation, struck his horses with the whip. The Hollahan case was in many respects quite similar to the one under consideration, in that there the car jumped the track and left the rails at a time when it was going at a "pretty good rate" and at a point where there were tracks leading out from the main track into the doors of the car stables. The court observed that, although such evidence was not strong and highly satisfactory, it nevertheless was within the province of the jury to infer negligence from the facts set forth. In the still more recent case of Braun v. Union Ry. Co., 115 App. Div. 566, which was also a case of a derailed car, the court held that, notwithstanding the suggestion in the Hastings case, the doctrine of *res ipsa loquitur* did apply where, as distinguished from the plaintiff, the defendant has full charge of the rails and the cars and of their mode of propulsion, and that under such circumstances the happening of an accident to the car upon which the plaintiff is a passenger, by reason of which the plaintiff sustains an injury, raises a presumption of negligence; and, accordingly,

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in that case the judgment dismissing the complaint was reversed.

In this case it is not necessary to apply the doctrine of *res ipsa loquitur*, because, as in the Hastings case, there is here present evidence not only of the accident but of its cause, namely, the rapid rate at which the car approached the curve. Therefore, under any of the authorities above cited, it was error to dismiss the complaint.

The judgment should be reversed and a new trial ordered, with costs to appellant to abide the event.

GILDERSLEEVE and ERLANGER, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

RUBIN KLEIN, Appellant, *v.* THE NEW YORK CITY RAILWAY COMPANY, Respondent.

(Supreme Court, Appellate Term, April, 1907.)

Carriers — Carriage of passengers — Liability for personal injuries to passengers — Actions by passengers for personal injuries — Sufficiency of evidence as to negligence.

Where it appears in an action by a passenger to recover damages for personal injuries received by him in alighting from a street car that, after the car had stopped to allow him to alight and when he was in the act of alighting and had one foot on the ground, the car suddenly started and threw him down, it is error to dismiss the complaint.

APPEAL from a judgment dismissing the plaintiff's complaint, in an action brought in the Municipal Court of the city of New York, fifth district, borough of Manhattan, and tried therein before the court and a jury. The pleadings are written and verified.

Irving I. Kremer, for appellant.

James L. Quackenbush, for respondent.

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Per Curiam. This action was brought by the plaintiff to recover damages sustained by him by reason of the carelessness and negligence of the defendant company in negligently operating a surface car upon which the plaintiff was a passenger. The testimony offered on behalf of the plaintiff is that of himself and two witnesses. At the close of plaintiff's case the defendant moved that the complaint be dismissed, and the court granted the motion to dismiss, to which plaintiff duly took exception. The plaintiff's counsel then requested that the question of negligence be submitted to the jury, which request was denied and to which denial plaintiff took exception. The court then awarded judgment to the defendant, dismissing the complaint. As the complaint was dismissed on plaintiff's evidence alone, the testimony on the trial is entitled not only to belief but to all favorable inferences that can reasonably be drawn therefrom. The uncontradicted testimony of the plaintiff is substantially as follows, viz: On the 1st day of August, 1906, he was a passenger on one of defendant's cars, proceeding in a northerly direction along Avenue B, in the city of New York. When the car reached the corner of Second street and Avenue B he wanted to alight therefrom, and requested the conductor to stop the car. The conductor signaled to the motorman, and the car did stop and came to a standstill at that corner, and as plaintiff was in the act of alighting therefrom, and before he had a reasonable opportunity to do so, the car started suddenly and plaintiff was thrown to the ground and sustained the injuries complained of. At the time he was thrown he had one foot on the car and the other "on the ground." The plaintiff was corroborated by one Fleischer, who testified that he was walking along Second street at the time of the accident; that when he reached the corner of Second street and Avenue B he noticed this car, which, at the time, was standing still, and that he saw the plaintiff as "he was just about to get off the car" and "the car gave a sudden move and he fell down;" that he went over to the plaintiff, and assisted him to his feet, and brought him to a doctor's office, and that he gave his name and address to the plaintiff as a witness. The plaintiff's testimony

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was also corroborated by the witness Tillie Brown, who testified that she was walking south on the easterly side of Avenue B, and "I saw the man about to get off, when all of a sudden the car gave a start and it threw the man (meaning plaintiff) to the ground." She also testified that when she first saw the plaintiff "the car was standing still;" that after plaintiff fell she went over to where he lay, inquired as to whether he was hurt and that she gave her name and address to the plaintiff; and that, after the accident, the car proceeded on its way and "ran right off." She also testified thus: "Q. How was he getting off this car when you saw him? A. He had one foot off, when all of a sudden the car gave a quick start and threw him to the ground." The plaintiff also proved the extent of his injuries by the testimony of Dr. Bernfeld, who made an X-ray examination of plaintiff immediately after the accident, and who testified that he found the plaintiff suffering from a dislocated thumb and contusions on various parts of his body. He also testified as to the reasonable value of his services. "In an action for personal injuries, after plaintiff has proved that the accident was caused by a sudden movement of the car, from which he was alighting, it is incumbent on defendant to prove that it was not responsible for the happening of that movement." Martin v. Second Ave. R. R. Co., 38 N. Y. Supp. 220; Harris v. Union R. Co., 74 id. 1012.

In the case at bar plaintiff established *prima facie* that he was free from contributory negligence and that the defendant was negligent in starting the car as it did, and the court below, in dismissing the complaint and refusing to submit the question of negligence to the jury, fell into error.

The judgment should be reversed and a new trial ordered, with costs to appellant to abide the event.

Present, GILDERSLEEVE, GIEGERICH and ERLANGER, JJ.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

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THEODORE H. MORRIS ET AL., Respondents, v. THE NORTH AMERICAN MERCANTILE AGENCY CO., Appellant.

(Supreme Court, Appellate Term, April, 1907.)

Principal and agent — Mutual rights, duties and liabilities: Construction and execution of contract and powers of agent — Fraud of sub-agent or employees of agent; Remedies as between the parties — Actions against agent for property or account — Defenses in general.

Where a mercantile agency company having a claim to collect receives the debtor's checks therefor payable to the order of the creditor and one of the company's agents forges the creditor's indorsements and deposits the checks with a trust company which collects them and turns over the proceeds to the depositor; and where the creditor thereafter sues the trust company and compromises its claim for less than the full amount and then sues the mercantile agency the latter cannot set up as a defense a release, given by the plaintiff to the trust company upon the compromise of the suit against it, which was expressed to be without prejudice to plaintiff's claim against the mercantile agency.

Such a release does not impair any remedy which the mercantile agency may have against the trust company.

APPEAL by defendant from an interlocutory judgment made at a Special Term of the City Court of the city of New York, sustaining a demurrer to the second defense contained in the supplemental answer.

Porter & Barnes (Louis H. Porter, of counsel), for appellant.

C. Andrade, Jr. (Francis M. Applegate, of counsel), for respondents.

ERLANGER, J. To a complaint charging conversion the defendant pleads that, when it received from plaintiffs the account against the West Machine Works of this city for six hundred and forty dollars, for collection, it turned it over to one Frank T. Okell, one of its employees, to make the collection, and that such employee received from the debtor, the West Machine Works, four checks in varying amounts

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to make up the full amount of the debt; that each of said checks was drawn to the order of plaintiffs, under their firm name of Morris, Wheeler & Co., and that said employee wrongfully, and without its or plaintiffs' authority, endorsed all of said checks by forging plaintiffs' name and depositing them to his individual credit with the Colonial Trust Company, and that the latter collected the whole of the six hundred and forty dollars, and paid the same to said Okell; that subsequently plaintiffs demanded of the Trust Company the said amount, and, failing to receive it, brought an action against said Trust Company to recover the same; that afterwards the action was settled and plaintiffs were paid by the bank four hundred and forty-three and twenty-one-hundredths dollars, and they executed to the Trust Company a general release which contained this reservation: "This release to be without prejudice to the rights of Morris Wheeler & Co. (plaintiffs) against The North American Mercantile Agency Company (defendant)." The release is set out at length in the supplemental answer, by way of a "Second Separate and Complete Defense," and the plaintiffs demurred thereto. The demurrer was sustained, and the defendant appealed. While the defendant has urged upon us with much plausibility, that, if it is deprived of the defense conferred by the release, it will be remediless as against the Colonial Trust Company, we are not inclined to agree with the views so expressed. When the account was sent to the defendant for collection it had the same effect as if it had been a note or draft, and the defendant occupied the same relation to plaintiffs as a collecting bank usually holds; and, therefore, when plaintiffs discovered that their fund had been diverted from its proper source they had the right to follow the same in whosesoever hands it might be found. Bank of Clarke County v. Gilman, 81 Hun, 486, affd. 152 N. Y. 634; Bank of America v. Waydell, 103 App. Div. 25; Salen v. Bank of State of New York, 110 id. 636. The funds were traced into the hands of the Colonial Trust Company, and a compromise was effected followed by the execution of the release. If the liability of the defendant to plaintiffs was contractual

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and joint with the Colonial Trust Company, the right to make the compromise without releasing the defendant is undoubted under section 1942 of the Code of Civil Procedure. On the other hand, if the liability rests in tort the release of one joint tort feasor, where a right to proceed against others is preserved, has the effect of a covenant not to further proceed against the one released, but preserves the liability as against the one expressly exempted from its provisions. Gilbert v. Finch, 173 N. Y. 455–466. The defendant is a stranger to the release and is not affected by it. Its right to proceed against the Trust Company that received the avails of the checks is coextensive with that of plaintiffs; and, if the Trust Company paid only a part of the claim, and the defendant shall be obliged to pay the residue, it may proceed against the Trust Company to recover the balance of the fund not paid by it. This privilege does not necessarily mean a right to subrogation, nor indeed of contribution; but, as already seen, it arises from the very fact that the Trust Company received the funds unlawfully, and of this the defendant as collecting agent could no more be deprived than could the plaintiffs.

The judgment must be affirmed, with costs.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment affirmed, with costs.

MORRIS CRESHKOFF, Respondent, *v.* ABRAHAM SCHWARTZ, Appellant.

(Supreme Court, Appellate Term, April, 1907.)

Pleading — Evidence admissible under the pleadings — In general — Evidence in reply to defense set up in answer.

In an action to recover the amount paid for two steamship tickets which were invalid and worthless where the defendant sets up a general release the plaintiff may show that he did not know the contents of the instrument and signed it in consequence of a misrepresentation as to its import.

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APPEAL by defendant from a judgment of the Municipal Court of the city of New York, fifth district, borough of Manhattan, entered against him in favor of plaintiff for the sum of one hundred and two dollars.

Solotaroff & Solotaroff, for appellant.

Ignatz Weisengreen, for respondent.

ERLANGER, J. Defendant appeals from a judgment entered against him for the sum of one hundred and two dollars damages and costs. The complaint alleges that, on July 8, 1905, in the city of New York, the defendant sold and delivered to plaintiff two steamship tickets from Rotterdam, Europe, to Philadelphia, for the use of the members of plaintiff's family, for which ninety dollars was paid to and received by defendant; that thereafter, in March, 1906, plaintiff discovered that the tickets "were invalid, void and of no effect"; that the defendant represented at the time of said sale that the tickets were "good and valid"; that by this means defendant obtained ninety dollars without plaintiff receiving value therefor; that he (plaintiff) was obliged to purchase "valid" tickets from a reliable dealer in place of those sold by defendant; that on May 14, 1906, plaintiff demanded the return of the ninety dollars which defendant refused to pay and by means of threats compelled plaintiff to accept a promissory note for said sum, payable June 30, 1906; that the note when due was not paid although payment was demanded and that defendant converted said sum of ninety dollars to his own use. The answer denies all the allegations of the complaint; and, by way of separate defense, a general release executed by plaintiff to defendant on May 12, 1906, was pleaded. Conversion was the theory upon which the action was tried. The only witness in the case was the plaintiff. He testified that, when he discovered that the tickets were worthless, he called upon the defendant and informed him of the fact and demanded the return of his money; that the latter said to him that he would give

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him a three-months note; that the note was given and when due "he (defendant) would not give me no money; he fired me down stairs." Further on, plaintiff testified: "He said I will give you this note and you must sign a paper that you cannot sue me in less than three months"; that he had no knowledge of the contents of the paper except as stated; that he could neither read nor write English. The court then inquired "Is the paper here?" and it was produced by defendant and, upon being shown to him, plaintiff admitted that he signed it. The court then directed that it be marked in evidence, and it was so received as an exhibit for plaintiff. On cross-examination the plaintiff again declared: "He said; all in this paper is, you can't sue me for three months." Plaintiff then rested and a motion was made to dismiss the complaint upon the ground among others "that if any action was proven at all, it was released by the general release." The motion was denied, to which defendant excepted. Judgment was awarded to plaintiff for one hundred and two dollars damages and costs, and a motion was made at the same time "for a body execution against the defendant for conversion." The defendant was not called nor was his subscribing witness to the release. There appears to be some confusion in the record resulting, no doubt, from the imperfect knowledge of plaintiff of the English language. While it is difficult to reconcile his evidence with the documentary proof, enough appears to show that he was made the victim of a shrewd speculator who employed his craftiness among the more ignorant of his countrymen to obtain money from them by questionable means. Plaintiff was choused out of ninety dollars and the defendant profited to that extent by selling to the former something which at the time had no greater value than mere waste paper. The note in evidence bears date May 14, 1906, and the release shows that it was executed on May 12, 1906. Unless an error was made in dating either of the papers, plaintiff must have been mistaken when he testified that at the time of the giving of the note defendant said to him "I will give you this note and you must sign a paper that you cannot sue me in less than three months." No attempt was made to reconcile this apparent

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inconsistency; and yet it may well be that both papers were signed and exchanged at the same time, and that the note was purposely dated a few days later and given to the plaintiff so that in case action was brought thereon the most that could happen was a judgment which would not carry with it the penalty of an execution against the person. True this is but conjecture, but the defendant could easily have explained the situation, but for reasons best known to himself he absented himself from the trial. While the note was admitted in evidence as a mere circumstance in the case, it seems not to be affected by the release, and it was tendered to defendant upon the trial. But we are concerned not with that question, but rather with the broader one as to whether, in view of the release concededly executed, the judgment can stand. Assuming for the purpose of this appeal, but without deciding, that the release is valid, could the trial court, who *sua sponte* directed it to be marked in evidence, ignore its effect as an instrument good on its face, and render judgment on the cause of action pleaded in the complaint. If the release be good, then it would seem that all causes of action existing in plaintiff's favor prior to its execution were merged in it and fell per force of the instrument Counsel for appellant contends that if the judgment is sustained serious consequences are likely to result to defendant; that his body is menaced and is likely to be taken if the judgment so rendered against him is not paid. Authorities are cited to show that courts are slow to give effect to adjudications which may result in the seizure of the person, and we are asked to follow the precedents in this case so that no harm can come to the defendant. Suffice it to say that there is not a single extenuating circumstance in the case in favor of defendant and the court should not be astute to find a way to aid him. We think that enough was shown to justify the court in disregarding the release, upon the ground of fraud and misrepresentation, and that it was subject to impeachment for that reason upon the trial. In Grockie v. Hirshfield, 50 App. Div. 87-90, Judge Laughlin in writing for the court said, referring to an instrument offered in evidence upon the trial: "But if considered as a release or agreement, it would, never-

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theless, have been subject to impeachment, as evidence in this case, for mutual mistake, fraud, or any misrepresentation by which the plaintiff was induced to sign without knowing its contents; for, as between the parties, the plaintiff's negligence in not ascertaining the true contents is not a bar to such relief," citing many cases. In Fleming v. Brooklyn Heights R. R. Co., 95 App. Div. 110, 112, the defendant pleaded a release to plaintiff's cause of action for injuries. Upon the trial it was relied upon to prevent a recovery. The court said: "If the jury adopted the plaintiff's story as the truth, as must be assumed from the verdict, it cannot be said that the rejection of the release as a defense was without adequate support. It is well settled that a release so procured may be impeached upon the trial by plaintiff for fraud or misrepresentation." See also Kirchner v. New Home Sewing Machine Co., 135 N. Y. 182, 189. Plaintiff's evidence clearly establishes that he was induced to execute the release by the misrepresentation of the defendant; that the contents or effect of it were unknown to him, except that in signing it he understood that he could not proceed against the defendant until after the maturity of the note. The fraud upon the plaintiff was palpable; nor was plaintiff obliged to sue upon the note; he had the right to proceed upon the cause of action upon which he recovered. The determination below was correct.

The judgment is affirmed, with costs.

GILDERSLEEVE, J., concurs; GIEGERICH, J., concurring in result.

Judgment affirmed, with costs.

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THE AETNA LIFE INSURANCE COMPANY, Appellant, v. DUPARQUET, HUOT & MONEUSE COMPANY, Respondent.

(Supreme Court, Appellate Term, April, 1907.)

Evidence — Best and secondary evidence — When secondary evidence is admissible — Sufficiency of secondary evidence — Copies of instruments.

Judgment — Rendition — At particular stages of the action — Judgment on dismissal.

In an action brought by an insurance company to recover premiums claimed to be due to it under the terms of its policies, where the original policies had been destroyed and it appeared that it was the custom of the company to issue policies according to the applications therefor and that the original applications for the policies in question were at the plaintiff's home office in Hartford, copies of such policies, offered by the plaintiff without any evidence that they conformed to the applications, were not competent evidence in support of the plaintiff's cause of action; and judgment of dismissal should have been rendered, without prejudice to a new action, but not judgment absolute in favor of the defendant.

APPEAL by the plaintiff from a judgment of the Municipal Court of the city of New York, first district, borough of Manhattan, in favor of the defendant, after a trial had before the court without a jury.

Winter & Winter, for appellant.

Hollander & Bernheimer (Clarence G. Bernheimer, of counsel), for respondent.

GIEGERICH, J. The action is brought for additional premiums alleged to be due on three policies of insurance, by which the plaintiff insured the defendant against liability for damages on account of injuries suffered by employees or others during the terms of said policies. The premium paid was based upon an assumed aggregate compensation which it was calculated would be paid to the employee during the

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period. The policies contained a further provision that, if the compensation actually paid should exceed the sum estimated, then the assured should pay an additional premium; while, if less, the company would return a portion of the premium. The action is brought upon the theory and upon the claim that the compensation actually paid greatly exceeded the amount estimated as the basis for the premium which the company received at the time the policies were issued. There was a sharp issue upon the trial as to what employees were covered by the policies and as to what was embraced under the word "compensation" used in the policies; whether the compensation of officers and the office staff and the like, or whether only outside employees. This issue was presented in the pleadings, as well as litigated upon the trial. It therefore became important that the exact forms of the policies should be before the court. Upon the trial it was stated by the defendant's counsel, in response to a notice to produce the policies of insurance in suit, that the originals had been destroyed by the defendant after the expiration of the periods specified in them. The plaintiff produced what it claims were copies. Its own witness, Phelan, stated that it was the practice of the company to issue policies according to the applications submitted by the one seeking insurance and that the original applications were sent on from the New York office, from which these policies were issued, to the home office of the company at Hartford. These original applications were not produced upon the trial, nor was there evidence by anyone who had made a comparison that either the alleged copies of the applications retained in New York, or the alleged copies of the policies which were produced at the trial, conformed to the original applications in Hartford. In the absence of these prerequisites, the admission of these papers in evidence was unwarranted (Nichols v. Kingdom Iron Co., 56 N. Y., 618); and, as proof of the plaintiff's cause of action rested entirely upon them, there was thus no legal proof of the same. In this view, the justice should have rendered judgment that the action be dismissed, without prejudice to a new action (Mun. Ct. Act, § 248); but instead

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of doing so he gave judgment absolute in favor of the defendant. This he clearly had no right to do; and, since we must render judgment according to the justice of the case, without regard to technical errors or defects which do not affect the merits (Mun. Ct. Act, § 326), we think that the judgment should be modified by directing that the dismissal be without prejudice to a new action and affirmed, as so modified, without costs of this appeal to either party.

Judgment modified by directing that the dismissal be without prejudice to a new action and, as modified, affirmed, without costs of this appeal to either party.

GILDERSLEEVE and ERLANGER, JJ., concur.

Judgment modified and, as modified, affirmed, without costs of this appeal to either party.

JOSEPH GOODMAN, Respondent, *v.* ABRAHAM GREENBERG and SOLOMON GREENBERG, Appellants.

(Supreme Court, Appellate Term, April, 1907.)

Evidence — Documentary evidence — In general — Proof of private instruments.

Acknowledgment — Operation and effect — Effect on admissibility in evidence.

A lease for a term of less than three years is not a "conveyance" within the meaning of section 935 of the Code of Civil Procedure making a conveyance, acknowledged or proved and certified in the manner prescribed by law to entitle it to be recorded in the county where it is offered, evidence without further proof thereof.

APPEAL by tenants from a final order of the Municipal Court of the city of New York, thirteenth district, borough of Manhattan, awarding possession of premises to the landlord.

Louis Levene, for appellants.

Moss & Feiner, for respondent.

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ERLANGER, J. On January 15, 1904, one Louis Goodman as landlord, by written lease, let unto one Michael Smith, as tenant, for the term of two and one half years, the premises which are the subject of this proceeding. The lease by its terms was to expire on December 31, 1906. On September 29, 1904, Goodman, by an instrument in writing, duly consented to an assignment of the lease to the appellants, who thereby agreed to assume all the terms and conditions imposed upon Smith with the same force and effect as if they had originally made said lease. Thereafter, and on October 3, 1904, the said Louis Goodman, died intestate, leaving him surviving his widow and seven children.

On January 4, 1907, the petitioner Joseph Goodman, describing himself as owner and landlord of an undivided one-seventh interest in the fee of said premises, brought this proceeding to oust appellants and their tenants from the premises, alleging that the term for which said premises were hired had expired.

On January 9, 1907, a final order was made awarding possession to said landlord, and from that order the tenants appeal.

Upon the trial it was admitted by appellants that Louis Goodman died intestate on October 3, 1904, leaving him surviving as widow and children the persons mentioned in the petition, and that no general or testamentary guardian had been appointed for the infant children, and that the petitioner was authorized by the widow and adult children to maintain this proceeding.

Appellants also admitted that they entered into possession of the premises on September 29, 1904, and are now in occupation thereof.

Respondent offered in evidence the lease and assignment, which were admitted, and then rested. Appellants offered the same documents, which were again admitted and then it was attempted to introduce in evidence a copy of a paper writing, the original of which it was claimed was recorded in the register's office of this county on the 20th day of November, 1906, certified by the register, and which certificate recites that the annexed copy was compared *with an*

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instrument recorded on the day last named in the register's office and was declared "to be a correct transcript therefrom, and of the whole of said instrument." Objection to the admission of the paper was made on the ground that it was incompetent and that no proper foundation had been laid for its introduction. On this objection being made the court said: "There is no foundation laid for its introduction," and the paper was marked "Tenants' Exhibit C, for identification." Under this ruling the paper was excluded. A verdict was thereupon directed in favor of respondent, and an exception noted. It is conceded by appellants that the only question involved on this appeal is the ruling made by the trial justice in excluding the paper writing referred to. No attempt was made to prove that Louis Goodman in his lifetime ever executed or delivered such a paper, nor was the original produced, or its loss accounted for so as to admit a copy as secondary evidence. We have been referred to no authority which under the circumstances made the paper competent. But it is asserted that, as the instrument was properly certified by the register of this county, it was receivable in evidence with like force and effect as the original, and that no proof was required in respect of its execution or effectiveness as original evidence; and section 935 of the Code is relied upon to sustain the claim. That section is as follows: "A conveyance, acknowledged or proved, and certified in the manner prescribed by law, to entitle it to be recorded in the county where it is offered, is evidence, without further proof thereof. Except as otherwise specially prescribed by law, the record of a conveyance, duly recorded, within the State, or a transcript thereof, duly certified, is evidence, with like effect as the original conveyance." The question then is, what is meant by the term conveyance, and the answer thereto may be readily found in the statutes. Section 240 of the Real Property Law, provides that "The term '*conveyance*' includes every written instrument, by which any estate or interest in real property is created, transferred, mortgaged or assigned, or by which the title to any real property may be affected, including an instrument in execution of a power, and although the power be one of revocation

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only; *except* a will, *a lease for a term not exceeding three years*, an executory contract for the sale or purchase of lands, and an instrument containing a power to convey real property as the agent or attorney for the owner of such property." If, therefore, a lease for three years is not within the purview of the act, it would seem to follow that a lease for a shorter period is also excluded. 9 Cyc. 860, 862.

The final order must be affirmed, with costs.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Final order affirmed, with costs.

ESTHER GLASSMAN, Appellant, *v.* THOMAS J. SURPLESS and GEORGE J. LUTZ, Respondents.

(Supreme Court, Appellate Term, April, 1907.)

Master and servant — Master's liability for injuries to servant — Actions — Weight and sufficiency of evidence — Negligence on part of master.

In an action to recover for personal injuries sustained by the falling of defendants' elevator operated by their servants, where it appears that the elevator fell with a crash and plaintiff was pulled out between two floors crying and hurt, there is evidence of negligence sufficient to submit to the jury and it is error to dismiss the complaint.

APPEAL by the plaintiff from a judgment of the City Court of the city of New York dismissing the complaint.

Feeney & Kornblueh (David Kornblueh and Benjamin Marcus of counsel), for appellant.

Fred E. Fishel, for respondents.

ERLANGER, J. For injuries alleged to have been inflicted upon her through the negligence of the defendants, plaintiff sues to recover damages. The complaint charges that the defendants are the owners of a building eleven stories high,

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in which passenger elevator cars are maintained and operated by their employees; that on the day of the accident plaintiff was employed by one of the defendants' tenants who occupied the tenth floor; that, in going to and from her work, it was necessary for her to use the elevator; that, on the evening of February 8, 1904, using due and reasonable care and without negligence or interference on her part, she entered the elevator to go to the ground floor; that, through the negligence of defendants and their servants and owing to the then bad condition of the elevator and to the fact that the operator of the car had no control of the lever, the car dropped with a sudden jerk from the tenth to the fourth floor; that in consequence she was violently thrown to the floor of the car and severely injured. The answer admits the ownership of the *locus in quo* and that the elevator was operated by employees of defendants. Upon this issue the parties proceeded to trial. The plaintiff testified to the falling of the elevator and that she and other girls were pulled out and she described her condition and injuries, the effect of which, it is claimed, largely decreased her earning capacity. Her employer testified that he was on the eighth floor at the time and all of a sudden heard a crash, or some extraordinary noise; that, in going to the elevator, he saw it slide and heard a noise coming from it; that he ran down to the floor; that a number of people were standing at the elevator door; that plaintiff was crying and hurt; that he and two of his employees pulled her out between the fifth and sixth floors. Another witness, in the elevator at the time and also injured, testified: "We all entered the elevator and it broke or something happened and the elevator fell." This was substantially plaintiff's proof at the time her case was rested; and, thereupon, a motion was made to dismiss the complaint "upon the ground that there had been an absolute failure to show anything like liability or negligence on the part of the defendants and that the plaintiff has not shown anything other than an accidental movement of the elevator. It is true they say it fell to the floor." Here followed some colloquy between counsel and the court as to the proof required on the part of the plaintiff, the

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defendants claiming that plaintiff was bound to show "something in the way of a defect, or that points to a defect. Something must be shown out of the usual movements of the elevator; the mere moving, simply, of an elevator I do not think is sufficient to prove its breaking down as that may have occurred *through carelessness on the part of the operator.*" To this statement the court assented and dismissed the complaint. Plaintiff excepted. This ruling was error. It has been determined over and over again that, in cases of non-suit, the party non-suited is entitled to the most favorable inferences to be drawn from the evidence. Applying this rule, we think that sufficient facts were shown by plaintiff to entitle her to go to the jury. True, the defendants' negligence was made the issuable fact in the case; and, while affirmative proof to establish negligence either in the condition or in the operation of the car was necessary, plaintiff was not required to prove the specific defect in the car or the particular act of misconduct in its operation. It was enough if plaintiff proved facts and circumstances from which the jury might fairly infer that the car was either defective in its condition or negligently operated. Peck v. N. Y. C. & H. R. R. R. Co., 165 N. Y. 347. Defendants' counsel in stating his grounds for a dismissal of the complaint declared "that the breaking down may have occurred through carelessness on the part of the operator." If that be true, plaintiff was entitled to go to the jury. A presumption of negligence may arise from the nature of the act — as for example the fall of an elevator. Griffen v. Manice, 166 N. Y. 188. That a cylinder burst and fell into the street. Goll v. Manhattan R. Co., 24 N. Y. St. Rep. 24; affd., 125 N. Y. 714. The fall into the street of a bolt from an elevated road. Volkmar v. Manhattan R. Co., 134 N. Y. 418. The fall of a brick into the street from a house in course of construction. Guldseth v. Carlin, 19 App. Div. 588. Fall of boom of derrick. Reed v. McCord, 18 App. Div. 381. Fall of chisel from structure into street. Cahalin v. Cochran, 1 N. Y. St. Rep. 583. Fall of live wire into street. Jones v. Union Ry. Co., 18 App. Div. 267. Shock from electricity. D'Arcy v. Westchester El. R. Co., 82

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App. Div. 263. Instances might be multiplied by further citations, but the foregoing suffice to show that enough was established by plaintiff to put defendants to their proof. In Griffin v. Manice, *supra*, the Court of Appeals broadly assert that the principle of "*res ipsa loquitur*" depends upon its application "on the circumstances and character of the occurrence, and not on the relation between the parties, except indirectly, so far as that relation defines the measure of duty imposed on the defendant;" and the court, after illustrating the rule, goes on to say: "The maxim is also in part based on the consideration that where the management and control of the thing which has produced the injury is exclusively vested in the defendant, it is within his power to produce evidence of the actual cause that produced the accident, which the plaintiff is unable to present. Neither of these rules — that a fact may be proved by circumstantial evidence as well as by direct, and that where the defendant has knowledge of a fact but slight evidence is requisite to shift on him the burden of explanation — is confined to any particular class of cases, but they are general rules of evidence applicable wherever issuable facts are to be determined either in civil or criminal actions." Bogendoerfer v. Jacobs, 97 App. Div. 355. Counsel for appellant contended in favor of the application of this rule; but the trial court was not of the same opinion and, for the reasons shown, dismissed the complaint. We think this case falls within the rule of the cited and kindred cases and that, after plaintiff rested, the defendants were put to their proof to explain the cause of the accident. It may be that evidence can be produced to satisfy the jury that the cause was one which could not be foreseen and which may be found to absolve them from liability; but that question must be left to the arbitrament of a jury, the legally constituted tribunal to determine the facts. And so it was competent to prove that a similar accident occurred shortly before the one which happened to the plaintiff, as tending to establish notice to the defendants of some defect which required of them the exercise of reasonable care, both with regard to inspection as well as the repairs to be made, in order to make the car

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safe for those who had the right to make use of it. Hanselman v. Broad, 113 App. Div. 447, 449.

The judgment is reversed and a new trial ordered, with costs to appellant to abide the event.

GIEGERICH, J., concurs in result.

GILDERSLEEVE, J. (concurring). I concur in the result reached by my associate Mr. Justice Erlanger.

As the complaint was dismissed upon plaintiff's evidence alone, such evidence is not only entitled to belief, but also to such favorable inferences as can reasonably be drawn therefrom. The undisputed facts are as follows, viz: Plaintiff was employed by a tenant of defendants. She lawfully entered the passenger elevator in defendants' building, which was entirely under the management and control of defendants' servants. For some unexplained reason the elevator made a sudden drop from the tenth floor of said building to a point between the fourth and fifth floors, where it as suddenly stopped short, thereby causing serious injuries to the plaintiff. The latter's counsel sought to show, by one of the employers of plaintiff and a tenant in said building, as we have seen, that a similar accident to this elevator occurred about three months prior to the accident in question; but the court refused to admit such evidence, to which ruling exception was taken. The evidence was admissible as in some degree tending to show the probability of the dangerous condition of the elevator as well as notice of such danger to defendants. It seems to us also that the facts disclosed called upon the defendants for some explanation. The reasonable conclusion from the evidence adduced supports the allegations in the complaint that the elevator car was in bad condition and that the employee who operated the car failed in his duty by not properly controlling the lever of the car. We think it was error to dismiss the complaint.

The judgment must be reversed and a new trial ordered, with costs to appellant to abide the event.

Judgment reversed and a new trial ordered, with costs to appellant to abide the event.

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ADOLPH HORST, Respondent, v. HERMAN WALTER, Appellant.

(Supreme Court, Appellate Term, April, 1907.)

Druggists — Liability for negligence.

Negligence — Acts or omissions constituting negligence — Dangerous machinery and substances — Persons liable — Manufacturers and sellers of articles causing injury.

It is an act of negligence for a druggist to give to one who asks for something to wash out a wound a solution of carbolic acid so strong as to burn the flesh and turn it black, and the person to whom it is given in response to such a request is not guilty of contributory negligence in using it for the purpose stated.

APPEAL by the defendant from a judgment of the Municipal Court of the city of New York, second district, borough of the Bronx, in favor of the plaintiff, rendered upon a trial before the justice without a jury.

Louis S. Posner, for respondent.

Fred V. Mayforth, for appellant.

GIEGERICH, J. The action was brought to recover for injuries received by the plaintiff through the alleged negligence of the defendant's servant. The plaintiff's wife went to the defendant's drug store and asked for something to wash out a wound or cut which her husband had received on his knee. The clerk gave her a small bottle bearing the words, among others, "Poison, Carbolic Acid." She took this home and applied it to the wound. The result was that the knee was burned and turned black and caused serious trouble. Upon chemical analysis the solution was found to contain between eighty-six and ninety per cent. of carbolic acid. Two questions are presented: (1) Was the act of selling the preparation under the circumstances shown one that would have constituted legal negligence if done by the de-

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fendant himself instead of his clerk; and (2), is this a case where the employer should be held responsible for the act of his clerk? On the first point it has been held in this State that a druggist is liable in negligence for damage caused by the sale of poisonous medicine without proper label or instructions. Wohlfahrt v. Beckert, 27 Hun, 74; affd., 92 N. Y. 490. In the present case there can be little question that it was a negligent act for the druggist to sell a solution of carbolic acid of such strength. Section 67 of the Sanitary Code prescribes that "No phenol, commonly known as carbolic acid, shall be sold at retail by any person in the city of New York, except upon the prescription of a physician, when in a stronger solution than five per cent.;" and it was conceded on the trial, by the defendant's attorney, that no druggist has a right to furnish such acid of a stronger solution than five per cent. unless accompanied by the prescription of a doctor. But aside from such prohibition of the Sanitary Code we do not think there can be any doubt that it is an act of negligence for a druggist, when asked for a solution to wash a wound, to sell a preparation of such a dangerous character as was furnished in this case. On the question whether the act of the clerk is chargeable to the defendant, there is little room for doubt. The general rule is that an act done by the servant in the prosecution of the business that the servant was employed by the master to do is chargeable to the master. Cosgrove v. Ogden, 49 N. Y. 255; Schultz v. Third Ave. R. R. Co., 89 id. 242. That this rule applies in the case of the preparation and sale of drugs has been held in this and other States. Thomas v. Winchester, 6 N. Y. 409; Norton v. Sewall, 106 Mass. 143. In the former of the two cases just cited, the defendant was held liable for injuries flowing from the act of his assistant in business in putting up belladonna, labeled as "dandelion," which, through the medium of several intermediate dealers, was ultimately sold to the plaintiff and used by her to her serious injury. It is suggested by the appellant that the plaintiff was guilty of contributory negligence, but we see no ground for any such contention. The plaintiff had a right to suppose that the defendant and his employees would per-

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form their duty with care and, when applied to for some solution to wash a wound, that they would furnish something if not efficient, at least harmless, and was warranted in applying it without further inquiry.

The judgment should be affirmed, with costs.

GILDERSLEEVE and ERLANGER, JJ., concur.

Judgment affirmed, with costs.

WILLIAM ROBINSON, Appellant, *v.* THE EMPIRE CITY SUBWAY COMPANY, LTD., Respondent.

(Supreme Court, Appellate Term, April, 1907.)

Street railways — Operation — Actions — Sufficiency of evidence — Negligence on part of company in general.

In an action against a subway company using the streets under authority of law, for personal injuries from an explosion of gas which occurred when some unknown man held a lamp near a manhole, the cover of which was off, where it does not appear how the gas came to be in the subway, negligence of the company is not to be inferred from the mere happening of the accident, though it appears that the company kept the subway in repair.

APPEAL by the plaintiff from a judgment of the City Court of the city of New York dismissing the action, with costs.

George N. Simpson (George H. Taylor, Jr., of counsel), for appellant.

Eidlitz & Hulse (William Butler, of counsel), for respondent.

GIEGERICH, J. The plaintiff seeks to recover for personal injuries received through an explosion at a manhole of the subway of the defendant, The Empire City Subway Company, as he was passing along the public street, at the

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corner of Twenty-fourth street and Eighth avenue in the borough of Manhattan. He testified that the cover was off the manhole and that some one was holding a lamp near it, whereupon the explosion took place, a sheet of flame shot out of the manhole and he was burned and injured. The action was brought, not only against the defendant above named, but also against the Consolidated Gas Company and others, but was tried against the former alone. It was not shown who the man was who held the lamp which caused the explosion, nor how the gas came to be in the subway. It is alleged in the complaint that the Consolidated Gas Company was using the subway at the time for the purpose of furnishing gas to its customers. It was stipulated upon the trial that the defendant Empire City Subway Company owned the subway in question at the time of the accident "and kept the same in repair." The plaintiff rests his claim to recover upon the doctrine of *res ipsa loquitur;* but we think the learned trial judge was right in refusing to apply that rule to the facts shown in this case.

In Thomas on Negligence (vol. 2, 2d ed., p. 1097), it is said that the rule established in this State, within recent years, is that, where the person charged as a wrongdoer is using the street under authority, he cannot be held responsible on the theory of nuisance and irrespective of any question of care and skill, as would be the case if he were using the street without authority, but only on the theory of negligence and for his lack of care and skill. In the words of that learned author: "In all cases where there was lack of authority to do the act from which the injury arose, a presumption of liability arises from the act and injury therefrom; but where the authority exists, then the usual rule of negligence would apply." In this case, the authority of the respondent to maintain the subway is not brought in question by any evidence, so no presumption of liability arises on the ground of unauthorized use of the street. So far as the rule of *res ipsa loquitur* is concerned, one of the considerations on which that rule is based is that the person against whom it is applied has exclusive control of the thing which has produced the injury. Griffen v. Manice, 166 N. Y. 188.

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Here such exclusive control is not shown. Gas manifestly was in the subway, and it was the explosion of gas that caused the injury. It is true, there is a stipulation that this defendant kept the subway in repair; but this does not necessarily include gas pipes that might have been in or near the subway, but not under the care or control of this defendant. The bad condition of such pipes, or some accident thereto or mismanagement thereof by the gas company's servants, might have caused the escape of gas that was at the foundation of the accident. Besides, the stipulation is not that the defendant was charged with the duty of keeping the subway in repair, but that it did keep it in repair. Strictly construed, therefore, so far as the stipulation implies any duty upon the defendant, it carries its own statement of the performance of that duty. I think the learned trial justice was right in dismissing the complaint on such a state of the proofs and that the judgment should be affirmed, with costs.

GILDERSLEEVE and ERLANGER, JJ., concur.

Judgment affirmed, with costs.

WILLIAM ROSENTHAL, Appellant, *v.* MEYER H. FREEDMAN ET AL., Respondents.

(Supreme Court, Appellate Term, April, 1907.)

Negotiable instruments — Bona fide holders — What constitutes a bona fide holder — Parting with value — Purchase at less than face value.

In an action upon a check for $175, valid in its inception, against the drawer who stopped payment on it, it matters not whether the plaintiff paid the payee the full amount of the check or only advanced ten dollars in drinks upon it so long as the plaintiff shows that he is a *bona fide* holder without knowledge of any equitable defenses in favor of the drawer against the payee.

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APPEAL by the plaintiff from a judgment in favor of the defendants rendered in the Municipal Court of the city of New York, fourth district, borough of Manhattan.

Henry S. Schimmel, for appellant.

Gustavus A. Rogers, for respondents.

Per Curiam. The uncontradicted evidence shows that the defendants owed one Berkowitz $200; that they gave him a check for $175; that Berkowitz went to plaintiff's saloon with the check, endorsed the same and delivered it to plaintiff; that plaintiff endorsed it and delivered it to his wife to be deposited in her bank, as plaintiff had no bank account in his own name; that plaintiff's wife endorsed the said check and deposited it in her bank; that defendants, owing to subsequent acts of Berkowitz, stopped payment on the check; and that when the check came back unpaid to plaintiff, he went to see defendants and asked them why they had stopped payment on the check. The plaintiff swears that he paid Berkowitz $175 in cash for the check. Defendants swear that at this interview, subsequent to the stoppage of payment, plaintiff told defendants that he had only advanced "$10 in drinks" on the check. Be that as it may, it is clearly established that the check was valid in its inception and that plaintiff took it without knowledge of any equitable defenses that defendants might have as against Berkowitz's right to payment of the check. Whether Berkowitz sold the check for its face value, or less, is no concern of the defendants, and plaintiff has shown himself by uncontradicted evidence to be a *bona fide* holder, and entitled to payment.

The judgment must be reversed and a new trial ordered, with costs to appellant to abide the event.

Present, GILDERSLEEVE, GIEGERICH, and ERLANGER, JJ.

Judgment reversed, and new trial ordered, with costs to appellant to abide event.

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SAMUEL HYMAN, Respondent, v. JANET P. DOYLE, Appellant.

(Supreme Court, Appellate Term, April, 1907.)

Negotiable instruments — Presentment and demand — Necessity of demand — As against maker.

A promissory note payable on demand after date is due forthwith; and, as between the maker and holder, an actual demand is not a condition precedent to an action.

APPEAL by the defendant from a judgment of the Municipal Court of the city of New York, seventh district, borough of Manhattan, in favor of the plaintiff, rendered after a trial had before the court, without a jury.

Jacob S. Strahl, for appellant.

Mark Goldberg, for respondent.

GIEGERICH, J. The action was brought upon a promissory note made payable "on demand after date" at a place specified. The proposition most strenuously contended for by the appellant is that the complaint should have been dismissed because of the failure on the part of the plaintiff to prove any demand. Decisions in other jurisdictions are relied upon in the appellant's brief, but the rule in this State is that, as between the maker and the holder, a promissory note payable upon demand is due forthwith. Wheeler v. Warner, 47 N. Y. 519; DeLavallette v. Wendt, 75 id., 579; McMullen v. Rafferty, 89 id., 457; Cottle v. Marine Bank, 166 id., 53; People v. St. Nicholas Bank, 44 App. Div. 313; Abbott's Forms of Pleading, 221, and authorities there cited. The only effect of qualifying a promise to pay by a mere specifying of demand at a fixed time and place is that, if the debtor is ready with the money at that time and place and no demand is made, he is exonerated from paying costs and interest for subsequent time, provided he keeps ready, pays the money into court when sued and pleads these facts in his answer. Tied. Com. Paper, § 310, and

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cases cited; Lockman v. Moore, 57 N. Y. 360; Abbott's Forms of Pleading, 221, and authorities cited. The defense that the plaintiff was not the real party in interest was set up, but was not substantiated by the evidence.

The judgment should be affirmed, with costs.

GILDERSLEEVE and ERLANGER, JJ., concur.

Judgment affirmed, with costs.

ELLEN R. DORSETT, Respondent, *v.* DOUBLEDAY, PAGE & COMPANY, Appellant, and FRANK W. SHUMAKER, Defendant.

(Supreme Court, Appellate Term, April, 1907.)

Negotiable instruments — Actions — Evidence — Sufficiency.

Where, in an action upon a promissory note by one claiming to be a *bona fide* holder for value, without notice and in due course, it appears that, as between the original parties, there was nothing due upon it from the makers to the payee; and where the testimony of the plaintiff and her son and the payee of the note sworn on her behalf indicates that the transactions by which she acquired the note were of an unusual character and not at all in accordance with the general usages and customs of business and there are no writings to corroborate it, the question whether the plaintiff was chargeable with knowledge or notice of the equities between the original parties should be submitted to the jury.

APPEAL from a judgment of the City Court of the city of New York in favor of the plaintiff, entered at a trial term upon a verdict directed by the court.

Malcolm Sundheimer, for respondent.

Kellogg, Beckwith & Emery (Frederick R. Kellogg and Dean Emery, of counsel), for defendant-appellant.

GIEGERICH, J. The action was brought upon a promissory note to recover the sum of $2,000 with interest and resulted in the direction of a verdict in favor of the plaintiff. The defense set up that the note in question was one of a

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series of similar notes given by the defendant Doubleday, Page & Co., to the defendant Shumaker, in payment for Shumaker's interest in a department known as the "Mail Order Department" of the business of said company; that the value of that interest was not ascertainable at the time the notes were given, but by agreement was to be later ascertained by methods provided in the agreement and that, in the meantime, Shumaker should hold and control the notes until the date of such final ascertainment and should return for cancellation any notes of the series which should be found to be in excess of such amount as finally ascertained and adjusted; further, that Shumaker, in violation of this agreement, transferred the note to one Rae Shepard Dorsett who had full notice of the terms and nature of the agreement and the conditions on which the note was executed and delivered and that the plaintiff in turn received the note from said Rae Shepard Dorsett with full notice of the facts and that she is only a nominal party and is prosecuting the action in the interest of Shumaker, and, if any value whatsoever purported to be advanced by the plaintiff or by said Rae Shepard Dorsett for the note, that the same had either been fully repaid, or that they have been indemnified by him for any such value advanced. Upon the trial the plaintiff was called and testified that she was the owner of the note, which she had purchased for $1,976.13; and she produced and there was put in evidence her check which she claimed to have given to the order of Rae Shepard Dorsett in payment for the note. Thereupon, the plaintiff rested; and a stipulation was introduced in evidence by the defendant which was treated by counsel on both sides and by the trial judge as conceding, for the purposes of the trial, that the note was given by the defendant Doubleday, Page & Co. to the defendant Shumaker on the terms and conditions alleged in the answer, but without prejudice to the plaintiff's claim that she was a *bona fide* purchaser for value and without notice and a holder in due course. Thereupon the defendant rested; and, under the circumstances, it devolved upon the plaintiff to prove that she took the note in good faith and without knowledge of the wrongful diversion. Berman v.

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Zuckerman, 22 Misc. Rep. 744. The plaintiff then read from her deposition, taken by the defendant before trial, showing that, while in Philadelphia, in March, 1906, she first heard from her son, Dr. Rae Shepard Dorsett, about the note; that she personally made no investigation at the time; that she deemed the name Doubleday, Page & Co. sufficient security and that, so far as the responsibility of that company was concerned, she was satisfied to rely solely upon her own judgment; but that exclusive of that point she relied upon the judgment of her son in the matter; that she had had no direct communication in regard to the note with Shumaker, either before or after payment was refused, and that she had no "definite, specific, first-hand knowledge whatever" about the relations between Shumaker and Doubleday, Page & Co. She further testified that her son always advised her in the care of her property and that he had selected the attorneys to take steps to collect the note. Testimony was also given in behalf of the plaintiff by Shumaker and Dr. Dorsett that they had been friends for years and that the note in question, with three others of like amounts, aggregating $8,000, was sold by Shumaker to Dr. Dorsett for a consideration of about $7,600, made up as follows: $2,500 being the aggregate amount of notes held by Dorsett against Shumaker; $1,600 applied by Dorsett on account of the purchase of three houses in the city of Philadelphia by him from Shumaker; about $2,000 in cash given by him to Shumaker at the time, together with $1,500 paid later by check. The notes aggregating $2,500 were not produced, however, nor was any clear explanation given of such alleged notes, except the fact that Dorsett had been in the habit of loaning money from time to time to Shumaker. It further appeared that Shumaker had never seen the houses but once which it was claimed he purchased, and that the deeds for the same, instead of being taken in his name, were taken in the name of Dorsett, and that no instrument or trust was ever executed by the latter nor any other writing made showing that the houses were Shumaker's. Neither was any writing produced showing the payment of $2,000 by Dorsett to Shumaker. It was claimed by them

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that this payment was made in cash, but Dorsett, who was a practicing physician in Philadelphia, does not explain in any satisfactory way how he came to have such an amount of cash on hand, except to say that he collected money from his patients and kept it in a deposit box, but he could not remember any other time when he had so large an amount as $2,000. It is worth mentioning, also, that the claim is made that the sum was made up principally of hundred dollar bills. After Shumaker received the $2,000 in cash, he did not deposit it in any bank, but turned it over to one Middlebrook, who, it is claimed, deposited it in his own account. Middlebrook was not produced as a witness, nor was any writing produced in corroboration of this explanation. There are many other facts that might be detailed, equally indicating that the transactions claimed to have been made were of an unusual character and not at all in accordance with the general usages and customs of business, and through all the testimony runs the fact that there is nothing in the way of pass books, checks, letters, memoranda or any other writings to corroborate the statements of these two witnesses. We are of the opinion that the evidence was such that it would have been entirely competent for a jury to have discredited the testimony of both Dorsett and Shumaker and to have found that the alleged transactions between them were fictitious and invented or devised for the purpose of enabling Shumaker to realize upon the notes and to put some one else in a position to enforce payment of the same against the makers. Under the circumstances, it was error to withdraw from the consideration of the jury the credibility of these two witnesses, one of them, Dr. Dorsett, being a son of the plaintiff, and the other, Shumaker, being the payee of the note. Although not directly contradicted, their testimony comes directly within the rule laid down in Hull v. Littauer, 162 N. Y. 569, 572, that: "If the evidence is possible of contradiction in the circumstances; if its truthfulness, or accuracy, is open to a reasonable doubt upon the facts of the case, and the interest of the witness furnishes a proper ground for hesitating to accept his statements, it is a necessary and just rule that the jury should pass upon it." The

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evidence that Dorsett acted as agent for his mother, the plaintiff, in the various transactions, is not so strong; but, in view of her own testimony above set forth and the testimony of her son that he managed her affairs, we are of the opinion that there was enough evidence to require that the question of his agency, and the consequent chargeability of his knowledge and conduct to her, should also have been permitted to go to the jury.

The judgment should, therefore, be reversed and a new trial ordered, with costs to appellant to abide the event.

GILDERSLEEVE and ERLANGER, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

DAVID RESHOFSKY, Respondent, *v.* JACOB WEISZ, Appellant.

(Supreme Court, Appellate Term, April, 1907.)

Taking case from jury and nonsuit — Weight and sufficiency of evidence — Evidence of defendant supplying defects in plaintiff's proof

Where a motion is made by the defendant at the close of plaintiff's case for a dismissal for a defect in the proof and erroneously denied, defendant's subsequent admission of the facts not proved cures the error.

APPEAL by the defendant from a judgment of the Municipal Court of the city of New York, fourteenth district, borough of Manhattan, in favor of the plaintiff, rendered after a trial had before the court without a jury.

Thomas & Oppenheimer, for appellant.

Rosalie Loew and Travis H. Whitney, for respondent.

GIEGERICH, J. The action was brought to recover a balance due on the sale of cigars by the plaintiff to the defendant of the value of $873.85 and the value of a showcase, $50, after crediting on account the sum of $761 admitted to have been paid. The trial justice rendered judgment for the plaintiff for the balance of $162.85, with costs. At the

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close of the plaintiff's case the defendant's counsel moved to dismiss on the ground that the plaintiff had failed to prove delivery of several of the items in the bill of particulars. Whether such motion was well grounded or not at the time it was made need not be considered, because the defendant in his testimony admitted the receipt of cigars in the precise amount sued for, thus bringing the case within the rule that a defect in the proof, existing at the time of the making of a motion to dismiss, is cured by evidence afterward adduced by either party. Painton v. Northern Central R. Co., 83 N. Y. 7; Hopkins v. Clark, 158 id. 299, 304; Reade v. Continental Trust Co., 49 App. Div. 400, 402; Tobin v. Manhattan Savings Inst., 6 Misc. Rep. 110; Moskowitz v. Hornberger, 20 id. 558.

Aside from the point just considered, there is no question in the case except one of the weight of evidence, and upon that question we find no reason for differing with the conclusion reached by the trial justice.

GILDERSLEEVE and ERLANGER, JJ., concur.

Judgment affirmed, with costs.

SENDER JARMULOWSKY, Appellant, *v.* MICHAEL SUSSKIND, Respondent.

(Supreme Court, Appellate Term, April, 1907.)

Contracts — Parties and persons by whom or against whom enforceable — In general — One not a party nor the person for whose benefit the contract was made.

Where two persons form a partnership and one agrees to pay the other a sum of money in consideration of the latter's contributing his established business, and it is provided that the latter may terminate the partnership by paying the money to a third party from whom the former borrowed it to enable him to enter into the copartnership, but the latter afterwards throws out his partner without paying the money, the lender cannot maintain an action against him therefor, the right of action under the partnership

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agreement residing in the other partner, at whose suit the copartnership affairs can be fully adjusted and the rights of all parties conserved.

APPEAL by plaintiff from a judgment in favor of defendant dismissing the plaintiff's complaint, rendered in the Municipal Court of the city of New York, fifth district, borough of Manhattan.

Feltenstein & Rosenstein, for appellant.

Rosenbluth & Silverman, for respondent.

ERLANGER, J. In February, 1905, the defendant Susskind and one Herman Markel, by written agreement, formed a copartnership under the firm name of Michael Susskind & Co., which was to continue for three years from February 23, 1905. The business to be conducted was real estate and brokerage. The defendant contributed "his already established business," and Markel contributed five hundred dollars, four hundred and seventy-five dollars of which sum was advanced by plaintiff for Markel's account. Markel was given the privilege of drawing fifteen dollars per week "on account of the profits to be derived during the term until September 30, 1905, and after that time the profits shall be equally divided between both partners." It was further agreed "that in the event the said Michael Susskind, for any reason whatsoever, desires to terminate this article of agreement within three months from the date hereof the said Michael Susskind shall have the right to pay the money received, namely five hundred dollars, unto its former owner S. Jarmulowsky in person, and then this contract shall be null and void, and terminated, and that the said Herman Markel herewith releases the said Michael Susskind of all claim or claims he may have against him and discharges Michael Susskind of any claims whatsoever, upon payment by the said Michael Susskind to the said Herman Markel of one third of the profits derived after deducting the total amount of the weekly payments to the said Herman Markel." At the end of the written articles a receipt is endorsed signed

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by the defendant acknowledging that four hundred and seventy-five dollars was paid by plaintiff "in compliance with above contract and for the purpose of carrying out the said contract." Markel received his weekly allowance up to within a few weeks before the expiration of the three months specified in the agreement for its termination, when the partners quarreled and as is claimed the defendant "threw Markel out." Plaintiff demanded from the defendant, after this event occurred, the return of the money which he advanced for the benefit of Markel; and the defendant paid, it is claimed, thirty dollars in two payments of fifteen dollars each on account, leaving four hundred and seventy dollars unpaid, to recover which this action was brought. This thirty dollars as received was paid over to Markel. The complaint refers to the articles of copartnership and the right to recover is predicated upon the clause above referred to. The answer tenders the general issue; and, after hearing the proof, the complaint was dismissed, upon the ground "that the contract gives no right of action in Mr. Jarmulowsky on the agreement." From this determination plaintiff appeals. The contract, though inartificially drawn, sufficiently shows the intention of the parties; and it would seem that in no circumstance could plaintiff, a stranger thereto, recover thereunder. It was not made for his benefit, nor did any consideration move from him. The fact that he loaned the money which admitted Markel into the copartnership, and the further fact that the defendant was given the privilege, if a dissolution occurred within the three months, of repaying to plaintiff direct the money paid for Markel's account, imposed upon the defendant no duty as promisor, so as to create the relation of debtor and creditor between him and plaintiff. The familiar principle of Lawrence v. Fox, 20 N. Y. 268, has no application to the case. No promise express or implied can be spelled from the contract in favor of plaintiff. In Vrooman v. Turner, 69 N. Y. 280–284, the Court of Appeals said: "A mere stranger cannot intervene, and claim by action the benefit of a contract between other parties. There must be either a new consideration, or some prior right or claim

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against one of the contracting parties, by which he has a legal interest in the performance of the agreement."

Tested by this rule it is evident that plaintiff has not even the semblance of a claim against the defendant. It was not within the contemplation of the parties to confer upon him either an interest in or a right under the copartnership agreement; and, without such right or interest, no action can be maintained by him. In Lorillard v. Clyde, 122 N. Y. 501, the Court of Appeals in a case somewhat similar to this said: "It is generally regarded as essential that none but a party to a contract has a right to complain of or to recover damages for the breach of it, against any of the other parties to it."

We think the court below properly decided the case. That the defendant treated his copartner with scant courtesy is evident from what was developed upon the trial. The right, however, to recover from the defendant is clearly vested in Markel; and, in an appropriate action, brought in the proper tribunal, the copartnership affairs can be fully adjusted and the rights of all parties conserved.

The judgment must be affirmed with costs.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment affirmed, with costs.

GEORGE KAPLAN, Respondent, v. ISAAC L. SHAPIRO ET AL., Appellants.

(Supreme Court, Appellate Term, April, 1907.)

New trial — Grounds — Verdict or findings contrary to law or evidence — Verdict contrary to instructions.

Saving questions for review — Objections and exceptions in general — Necessity — Instructions.

Joint agreements and liabilities — On contracts — Under joint debtor acts — Compromise by joint debtors.

Where a verdict is found contrary to the instructions of the court, it will be set aside without regard to the legal accuracy of the instructions; but only the party aggrieved by the disobedience of the jury has a right to complain.

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Where no exception is taken to the charge of the court, a judgment will not be reversed upon the ground that instructions to the jury were legally inaccurate.

Under the provisions of section 1942 of the Code of Civil Procedure, the mere payment by one partner of his part of the liability upon notes of the firm does not discharge the other partner from his share of the indebtedness.

Where, in actions brought by the payee of promissory notes against the makers who signed as partners, defendants answer separately, both pleading a general denial and the Statute of Limitations, and one adds a plea of release and payment and offers in evidence the receipt for his part of the indebtedness on the notes, but the evidence is conflicting as to whether in fact any money was paid when the receipt was given, and the trial justice instructs the jury, in substance, that, if they believe the plaintiff received the money called for by the receipt, their verdict should be for that defendant, and the jury find in favor of the plaintiff for the face of each note, less the amount receipted for and a partial payment made by the other defendant, he is not entitled to have the verdict set aside because it was contrary to the instruction of the court.

APPEAL by the defendant, Isaac L. Shapiro, from three separate judgments, rendered in favor of the plaintiff in the Municipal Court of the city of New York, thirteenth district, borough of Manhattan, upon the verdict of a jury.

Henry Lieb, for appellant.

Feltenstein & Rosenstein (Moses Feltenstein, of counsel), for respondent.

GIEGERICH, J. These three actions were tried together, but a separate judgment was entered in each. They are brought upon promissory notes made by the defendants, Isaac L. Shapiro and Michael Edelstein, as copartners doing business under the firm name of Shapiro & Edelstein, to the plaintiff. The note sued on in action No. 1 (calendar No. 80), is dated December 1, 1890, and is for $200, payable one month after date; the one in No. 2 (calendar No. 81), dated October 3, 1890, is for $241.86, payable four months after date, and the one in No. 3 (calendar No. 82),

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is dated October 3, 1890, and is for the payment of $250 within ninety days after date. The notes in suit are annexed to the return in action No. 2. The defendants answered separately in each action, Shapiro pleading a general denial and the Statute of Limitations, to which Edelstein in his answer added a plea of release and payment. Upon the trial the plaintiff testified that, after the expiration of six years from the maturity of the notes, viz., in January, 1902, the defendant Shapiro paid to him sums aggregating $55 on account of the notes in suit, and promised to pay the balance due thereon. There was, however, no proof offered that the defendant Edelstein participated in such payments or made any new promise to pay the notes; and so the complaint was dismissed as to him. The defendant Shapiro, testifying in his own behalf, denied that he made any payment on account of the notes or that he promised to pay the same; and he showed, by the testimony of Edelstein and of Edelstein's brother Louis, that, after the dissolution of the partnership, viz., on November 12, 1891, Edelstein, in the presence of Louis, paid to the plaintiff the sum of $346, in bills, and obtained the following receipt: "New York, November 12, 1891. Recd. Three hundred and Forty six $346 00/100 for his part of payment from ther padnership of Shapiro & Edelstein (sg) George Kaplan." Edelstein and his brother testified that when that payment was made he asked the plaintiff how much he owed him and the plaintiff named the sum above mentioned, which was thereupon paid. The plaintiff and his wife, on the other hand, gave testimony to the effect that when the receipt was given no money whatever was paid, and that the receipt was given merely for the purpose of being shown to his then intended father-in-law, from whom he expected to receive a couple of thousand dollars upon his marriage, and who, upon learning of his indebtedness to the plaintiff, inquired of him about it and was informed that it had been paid. The justice, adverting to the foregoing testimony relative to the defense of release, charged the jury in substance that, if they believed the plaintiff received the sum of money called for by the receipt claimed to have

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been given by him to Edelstein, their verdict should be for the defendant. The plaintiff duly excepted to such instruction. The jury, having returned from their deliberations, through their foreman, announced, "We find that the man shall pay each and every note," and the court thereupon directed them to retire in order to bring in a proper verdict. The jury returned and rendered the following verdict: "We find that the man shall pay on the face of each and every note, and deduct the $345 and $55." The defendant Shapiro thereupon moved to set aside the verdict, upon the various grounds specified in section 254 of the Municipal Court Act, which motion was subsequently denied; and judgment was entered in each action in favor of the plaintiff after deducting *pro rata* the sums above mentioned. The defendant Shapiro has appealed to this court and urges that the verdict of the jury is contrary to the above instructions of the court, and that the judgment should consequently be reversed. While such course would undoubtedly follow where the instruction is correct (Bigelow v. Garwitz, 15 N. Y. Supp. 940; 40 N. Y. St. Rep. 580; 11 Ency. Pl. & Pr. 60), there is quite a diversity of opinion, in jurisdictions other than our own, where the charge is incorrect; the courts in some States holding that the judgment must be reversed, while in others there are decisions which maintain the contrary view. 11 Ency. Pl. & Pr. 60, and citations. In this State, however, the rule is fairly deducible from the adjudications that, where a jury have found a verdict contrary to the instructions of the court, it will be set aside without regard to the legal accuracy of the instructions; but that only the party injuriously affected by the disobedience of the jury has the right to complain. In Sweetman v. Prince, 62 Barb. 256, it was held that the jury were bound to take the law from the court and could not disregard an instruction upon that subject, however erroneous it might be, and that, if they found a verdict contrary to such instructions, it was the duty of the court to set it aside. The case just cited was reversed on another point (26 N. Y. 224), but it is quoted with approval by Mr. Baylies in his very useful work on New Trials and Appeals (2d. ed., p. 542). The

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doctrine of that case, although the case itself is not mentioned in the opinion, seems to have been approved by the Court of Appeals in Wood v. Belden, 54 N. Y. 658, with the limitation, however, that only the party injuriously affected by the disobedience of the jury has the right to complain. See Baylies N. T. & App. (2d. ed.) 542. The accuracy of the instruction given to the jury, as above noted, is questioned by the appellant; but, since he did not except to it upon the trial, we would not be justified in reversing the judgment upon that ground. Muessman v. Met. St. Ry. Co., 76 App. Div. 1. Recourse must therefore be had to the record with a view of ascertaining whether or not, in any aspect of the case, the appellant has really been harmed by the instruction referred to, although the legal proposition therein contained may not have been correct; and, if he has not, then, under the rule above stated, the error may be disregarded. It will be seen from a reading of the paper claimed to have been given by the plaintiff to Edelstein, which is annexed to the return in action No. 2 (calendar No. 81) and is above set forth, that it is a mere receipt for the payment of the latter's part of the liability on the notes in suit and that, in the light of the authorities hereafter cited, it cannot fairly be construed as a release of the entire indebtedness. Partners are jointly and severally liable; and the payment by one partner of his part of the liability and his consequent release from the partnership debt, do not, without more, discharge the other partner from his share of the indebtedness, as will be seen from the following provisions of section 1942 of the Code of Civil Procedure, viz.: "A joint debtor may make a separate composition with his creditor, as prescribed in this section. Such a composition discharges the debtor making it; and him only. The creditor must execute to the compounding debtor a release of the indebtedness, or other instrument exonerating him therefrom. A member of a partnership cannot thus compound for a partnership debt, until the partnership has been dissolved by mutual consent or otherwise. It that case the instrument must release or exonerate him, from all liability incurred by reason of his connection with the partnership.

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An instrument, specified in this section, does not impair the creditor's right of action against any other joint debtor, or his right to take any proceeding against the latter; unless an intent to release or exonerate him appears affirmatively upon the face thereof." The Appellate Term, in Siefke v. Minden, 40 Misc. Rep. 631, construing this section, through Mr. Justice Gildersleeve, said (p. 634): "Section 1942 authorizes a creditor to compromise with one joint debtor upon releasing him from the joint obligation, without releasing the other joint debtor, and to compromise with a partner after the dissolution of the copartnership, upon giving him a discharge from all liability, as partner, to the plaintiffs, with the same effect." There the plaintiffs, as executors, sued two partners after dissolution of the partnership for rent and water rates under a lease from the former's testator to the latter. The action having been severed, a judgment was recovered against one of the partners for $950.81, and the plaintiffs accepted from him $500 in satisfaction of the judgment as to him. Thereafter, a supplemental complaint was served and the result was a verdict for the plaintiffs against the other partner by direction of the court. On appeal it was held that the defendants were joint debtors as well as partners between themselves, and that, within sections 1942 and 1946 of the Code of Civil Procedure, the plaintiffs could compromise with one of the partners without releasing the other from the residue of the demand or precluding a continuance of the action against him. It thus appears from these authorities that the alleged payment by Edelstein to the plaintiff of a part of the partnership debt did not operate as a release of the appellant from the other part thereof. Assuming, therefore, as we must from the finding of the jury, that such payment has been established and that all other controverted questions of fact have been resolved in plaintiff's favor, it is manifest that the verdict which was rendered is right. Under these circumstances, there is no just cause for complaint on the part of either party, especially by the appellant, who as above shown had only pleaded the Statute of Limitations in addition to a general denial and, therefore,

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under the form of his answer, would not, but for such instruction, have been in a position to avail himself of the payment so made by his former partner. The appellant was therefore the gainer and not the loser by the instruction, since it resulted in the jury deducting from the partnership debt the part so paid by Edelstein, which could not have been done but for such instruction. From all this, it is evident that the appellant was not injuriously affected by the jury's disregard of the instruction; but, on the contrary, he profited by it, and has no right to complain.

The several judgments appealed from should, therefore, be affirmed, with costs.

GILDERSLEEVE and ERLANGER, JJ., concur.

Judgments affirmed, with costs.

PETER THEOPHINE, Respondent, *v.* CONSTANTINE G. VLACHOS, Appellant.

(Supreme Court, Appellate Term, April, 1907.)

Evidence — Admissions — Admissibility as affected by subject matter of admission — In general — Time of making.

In an action by the payee against the maker of a promissory note given in part payment of the purchase price of a certain machine sold under a contract providing for the return of the purchase price upon the happening of either of two events, it is error to exclude evidence of plaintiff's admissions as to the machine and the terms of sale material to the defense because they were made after the maturity of the note.

APPEAL by defendant from a judgment in favor of plaintiff for $204.29, entered in the Municipal Court of the city of New York, eighth district, borough of Manhattan.

Goldsmith & Rosenthal, for appellant.

M. Angelo Elias, for respondent.

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ERLANGER, J. This is an action on a note for two hundred dollars. The answer admits its due execution and delivery, but as an affirmative defense thereto charges, "that plaintiff payee sold to defendant a certain machine for which the note was given as part payment; that at the time of the sale of the machine and the giving of the note it was agreed that, if any suit was threatened against defendant for any infringement of any patent rights, or in the event of any claim being made by any person against the defendant for any damages for royalty for the use of said machine, that then and in either event the plaintiff would return to the defendant the consideration paid upon the purchase of said machine and the defendant was then authorized to return the machine to the plaintiff; that in pursuance to said agreement the note was executed; that prior to the maturity of the note the defendant received notice that the said machine sold to defendant by plaintiff was an infringement upon a patent issued to a person other than the manufacturer of said machine; that the use of said machine was forbidden, and that if the defendant continued to use said machine he would be compelled to account in an action brought against him for that purpose and also for the purpose of perpetually enjoining the use thereof; that thereupon and before the maturity of said note, the defendant tendered the machine to the plaintiff and demanded the return of his note, which tender and demand was refused. That the defendant has since been ready and willing to return the machine." A counterclaim upon the same lines was also set up in the answer and judgment demanded for fifty dollars. The court heard the proofs of the parties and directed a verdict in favor of the plaintiff, upon which verdict judgment was rendered for two hundred twenty-eight and seventy one-hundredths dollars, damages and costs.

The defendant appeals and assigns various errors deemed by him sufficient to reverse the judgment. During the course of the trial the defendant sought to prove by a witness certain admissions made by the plaintiff with regard to the machine and the terms of sale. The offer was excluded upon the ground that the admissions sought to be

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elicited from the witness were made after the maturity of the note. The evidence excluded was material and bore directly on the issue tendered by the defendant. The mere fact that the alleged admission was made after the maturity of the note did not make the evidence incompetent. "In a civil action the admissions by a party of any fact material to the issue are always competent evidence against him, *wherever, whenever or to whomsoever made.*" Reed v. McCord, 160 N. Y. 341, and many cases cited. The offer of proof made by defendant with regard to the evidence sought to be elicited from the witness was stricken from the record, and the repeated efforts of his counsel to prove the admissions were frustrated by objections on the part of the plaintiff, all of which were sustained by the court. The exception presents reversible error. Again, the letters written to the Racine Company and the answer received were competent as bearing directly upon the issue tendered by defendant, and their exclusion was error.

The judgment must be reversed and a new trial ordered, with costs to appellant to abide the event.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

THE AETNA INDEMNITY COMPANY, Respondent, *v.* PETER J. RYAN, Appellant.

(Supreme Court, Appellate Term, April, 1907.)

Offer and acceptance — Sufficiency of acceptance — Implied acceptance — Performance of terms of offer — Signature by one party only.

Principal and surety — Rights and remedies of surety against principal — Compensation for use of credit — Under contract with surety company.

An application for a surety bond signed by the applicant in consideration of the mutual covenants of the surety company and delivered to, accepted by and acted upon by the company constitutes a complete contract between the parties.

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Where a bond given for the faithful performance of a contract with a municipality, dated January 25, 1904, to erect a hook and ladder building required the contractor to annually pay the premiums on the bond until the completion and acceptance of the work covered thereby, of which facts he agreed to notify the surety company in writing, and under one of the specifications of the contract all roofing, gutters, etc., were to be warranted and maintained for twelve months after the completion of the building, the liability of the surety company ceased only upon acceptance of the work by the city.

In an action brought in September, 1906, to recover the premiums for 1905 and 1906 which were payable in advance on January 25 of each year, the reception of the testimony of a clerk in the city comptroller's office that the bond given under the contract was still in force is clearly improper, where the fact of the completion and acceptance of the work is not shown to have been within the knowledge of the witness, but error in admitting his testimony is cured, where the contractor testifies that the work was completed in March, 1905.

As the plaintiff's liability continued to March, 1906, it was only entitled to recover premiums up to that date, although defendant had given no written notice that the work had been completed and accepted.

As the liability of the surety company was to continue until "completion and acceptance", the time of the completion of the work must be deemed to be coexistent with the acceptance; and the liability of the surety company continued until both contingencies occurred.

APPEAL by the defendant from two judgments of the Municipal Court of the city of New York, second district, borough of Manhattan, rendered in favor of the plaintiff.

Frank Leo Ryan, for appellant.

Lexow, Mackellar & Wells (T. Tileston Wells, of counsel), for respondent.

ERLANGER, J. The plaintiff brought these actions to recover premiums upon two surety bonds, given by it to the city of New York as security for the faithful performance by the defendant of two contracts made between the city and the defendant. One contract provided for the erection

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of a building in the borough of Manhattan for Hook and Ladder Company No. 8, and one for repairs upon public school building No. 11, in the borough of the Bronx.

The questions involved in each case are similar and by stipulation they were tried as one case. Prior to the issuance by the plaintiff of the bonds in question, the defendant signed and delivered to the plaintiff a printed form or application, evidently issued by the plaintiff to its customers, containing the rates to be paid as premium and the terms and conditions under which surety bonds are issued, and imposing certain requirements to be kept and conformed to by the persons applying for such bonds when executed by the plaintiff. These forms contain the name of the plaintiff, designated therein "as the party of the second part," and a blank space for date and the name of the applicant who is to be designated therein "as the party of the first part." So far as it is material to the determination of the questions involved in the present controversy, the following clause in said application need only be considered: "The said party of the first part does covenant and agree to pay in advance * * * a premium or charge for the first year of the life of the said bond of one-half of one per cent. on the amount of said bond and annually in advance thereafter of one-half of one per cent. on the amount of the bond; it being expressly understood and agreed that the life of any contract bond shall be the interval between the date of said bond and the date of the completion and acceptance of the work covered by said bond. The said party of the first part hereby agrees to give notice in writing to said surety company of said completion and acceptance." The defendant, as before stated, signed said application and delivered it to the plaintiff. The plaintiff thereupon issued two surety bonds running to the city of New York, both conditioned, in substance, that the defendant would well and truly and in a good, sufficient and workmanlike manner perform the work and furnish the material and in every respect comply with the conditions and covenants contained in the contract or agreement made between the city and the defendant whereby and wherein the defendant agreed to

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erect one and repair the other building hereinbefore mentioned. The plaintiff did not sign the application referred to and, as it recited that the defendant signed "in consideration of the mutual covenants of the plaintiff," the defendant alleging that it contained no "mutual" covenants, it is urged by the appellant herein that such application is without consideration, unenforceable against the defendant; that there is no proof of a promise on the part of the defendant to pay renewal premiums and that no action by the plaintiff can be predicated thereon. A complete answer to that contention is that the printed application, when signed by the defendant and delivered to the plaintiff and by it accepted and acted upon, constitutes a complete contract between the parties, each being bound by its terms. Lord v. Cronin, 154 N. Y. 172. The acceptance of the application by the plaintiff was indicated by the execution of the bonds. The defendant accepted the bonds and received the benefits arising therefrom and cannot be heard to assert that he is not bound by the provisions of the application made by him therefor and forming the contract upon which the bonds were issued. In action No. 1 the plaintiff seeks to recover the sum of $100. The bond given by the plaintiff in this case was to secure the city from loss upon a contract made between the defendant and the city for repairing the school building before referred to and was dated February 27, 1904. One year's premium was paid thereon and the plaintiff canceled the bond as of September 1, 1905. The bond in action No. 2 was given upon a contract for the erection of the building for Hook and Ladder Company before referred to, and was dated January 25, 1904. The complaint in both actions alleges that the amount of the first year's premium was reduced by the plaintiff for the second and third years in which the bonds were in force from one per cent. on the amount of the bonds to one-half of one per cent.; and on the bond given on the hook and ladder contract the plaintiff claimed the sum of $400, being two years' premium from January 25, 1905. This claim was made upon the ground that no notice had ever been received by the plaintiff from the defendant of the completion and ac-

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ceptance of the building by the city. The question to be determined in these actions is, when the liability of the plaintiff under the bond ceased. The plaintiff offered the testimony of one McGuirk, a clerk in the comptroller's office, who, over the defendant's objection, was allowed to testify that the bond given under the contract to erect the hook and ladder building was still in force. This testimony was clearly improper, as its accuracy depended upon the existence of a fact not shown to have been within the knowledge of the witness, viz.: whether or not the defendant had completed the erection of the building and whether or not the city had accepted the same. It was shown, and substantially admitted, that the plaintiff had never received notice of the completion and acceptance by the city of the hook and ladder house. The admission of the evidence of McGuirk was harmless, however, as the error was cured by the testimony of the defendant, by whom it was shown that the work on the hook and ladder building was begun in May or June, 1904, and completed in March, 1905; but there is no proof of any acceptance of the building by the city, except the testimony of defendant, who swears that possession was taken by the city about the time the building was completed. This testimony was not disputed and must be taken as true. The taking possession of the building by the city must be considered, in the absence of proof to the contrary, as an acceptance of the work done under the defendant's contract, unless it was shown that the contract provided otherwise therein. It appeared that one of the specifications contained in the contract for the erection of this building was as follows: "All the roofing, gutters, etc. are to be done in the best manner and warranted and maintained for twelve months after the completion of the building." The condition of the bond being as hereinbefore stated, it will be seen that the defendant was bound to the city for twelve months after the completion of the building; and, consequently, the liability of the plaintiff under the bond existed for that time. Assuming then, that the building was completed and accepted by the city in all respects, except as to the requirement of the specification above men-

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tioned contained in the contract, which still remained in force in March 1905, and of this fact there seems to be no substantial dispute, the liability of plaintiff continued until March, 1906; and, as payments of the premium on the bond were to be made "in advance," they accrued on January 25th of each year, the date of the bond, during the life of the bond; and, therefore, there was due the plaintiff on January 25, 1905, the sum of $200, and on January 25, 1906, a like sum; and, had the plaintiff brought an action at any time prior to March, 1906, during the time of its existing liability, no doubt could be cast upon its right to recover the sum of $400, the amount recovered in this action, leaving the defendant to his right to recover for any portion of the unearned premium after the plaintiff's liability had ceased. This action was not brought, however, until September, 1906, some months after the obligation of the defendant under the contract to the city had terminated, and the plaintiff having accepted and adopted the terms of the application made by the defendant, which expressly declared and agreed that the life of the bond shall be the interval "between the date of said bond and the completion and acceptance of the work covered by said bond," can recover in this action no more premium than was earned during the existence of the plaintiff's liability thereunder, the bond having expired when defendant's accountability to the city terminated. The plaintiff recovered in this action upon the theory that it was entitled to payment of premiums notwithstanding the "completion and acceptance of the work, until the defendant gave written notice of such completion and acceptance. With this theory we do not agree. It is true that there was a provision in the application that the defendant should give such notice. That provision was for the benefit of the defendant only and cannot be held to abrogate or overrule the express declaration in such application that the life of the bond shall be the interval between its date and the completion and acceptance of the work. There is no penalty attached to the failure to give such notice, nor does the application contain a provision to the effect that payment of the premium should continue until such was given. More-

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over, the plaintiff did not treat the clause requiring the giving of the notice as of any moment, as, in action No. 1, it canceled the bond as of the date of the completion and acceptance of the work, in September, 1905, although it did not receive notice thereof until February, 1906; and it is perfectly manifest that it was the intent of the parties that the premium charged was to be based upon the time that plaintiff's liability existed, without regard to whether or not the specified notice was given. It follows, therefore, that the plaintiff in action No. 2 is entitled to a judgment for premium under a liability existing from January, 1905, to March, 1906, being twelve months after the city took possession of the building, or a total period of one year and two months, instead of two years, as allowed in the court below, such premiums amounting to the sum of $233.33. In action No. 1 the bond issued to protect the city upon the school building was dated February 27, 1904. The defendant claims that the work was completed on April 1, 1905; but he offers no evidence of an acceptance by the city except that he testified that the city took possession of the building in September, 1905, which corresponds with the date of the cancellation of the bond by the plaintiff. As the liability of the plaintiff was to continue until "completion and acceptance" the time of the completion of the work must be co-existent with the acceptance, and the plaintiff's liability continued until both contingencies occurred. This bond was in force, therefore, from February 27, 1904, until September, 1905; and, the first year's premium thereon having been paid, the claim of the plaintiff to a six months' premium from February to September seems well founded and supported by proof. The contention of the defendant that there was an accord and satisfaction is without merit and is not sustained by the evidence. The interest upon the amount due has evidently been miscalculated in this action. Judgment was rendered for $16 interest. As before stated, the first year's interest was paid and the plaintiff is entitled to but the interest from the date the second year's premium was due (February 27, 1905) until the time the judgment was rendered (November 28, 1906), a period of one year

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and nine months, the correct amount of interest being $10.50, making the recovery $110.50 instead of $116. In the other action the plaintiff is entitled to interest on $200 from January 25, 1905, to November 28, 1906, amounting to the sum of $22; and on the sum of $200 from January 25, 1906, to April 1, 1906, amounting to the sum of $2; and on $33.50 from April 1, 1906, to November 28, 1906, amounting to $1.33; the total amount of premium and interest aggregating $258.66.

The judgment in action No. 1 will be modified by reducing the amount of recovery to $110.50 and the appropriate costs in the court below and, as so modified, affirmed, with costs.

In action No. 2 the judgment will be modified by reducing the same to $258.66 and appropriate costs in the court below and, as so modified, affirmed, without costs to either party.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment in action No. 1 modified, and, as so modified, affirmed, with costs.

Judgment in action No. 2 modified, and, as so modified, affirmed, without costs.

MINNIE KAUFMANN, Respondent, *v.* ANNA E. BRENNAN ET AL., Appellants.

(Supreme Court, Appellate Term, April, 1907.)

Vendor and purchaser — Performance of the contract — Time for performance — When of the essence of the contract.

In an action at law to recover a deposit made under a contract for the sale of real property, or for damages for a breach thereof, the time appointed for a delivery of the deed will not be regarded as of the essence of the contract, although a precise day and hour are fixed, unless by express provision performance upon the day and hour named is made matter of substance of the contract, or where previous to the day set for closing the title reasonably sufficient notice has been given to the vendor that, for specified reasons, prompt performance of the contract is required.

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Where a contract for the sale of real property contains no provision making prompt performance any part of the substance of the agreement, and the intending purchaser, before the time set for the delivery of the deed, gives no notice to the vendors that she requires prompt performance but appears at the time and place appointed for the closing of the title and after waiting some time tenders the amount due under the contract to the attorney who has charge of the matter and immediately thereafter leaves the office saying she can wait no longer and that if the vendors come to inform them that she will refuse to take title because the building is not ready; and where, in an action by her to recover the deposit made on the execution of the contract and for damages for the breach thereof, it is shown that the vendors' failure to appear at the stipulated time was not intentional but due to a mistake on their part as to the hour fixed for closing title and that they were at all times subsequent to their tardiness in appearing on the day named, able, ready and willing to perform the contract on their part and notified the plaintiff to that effect but she ignored all such notices, time is not of the essence of the contract; and the failure of the defendants to appear at the time and place agreed upon was excusable and did not of itself constitute a breach of the contract, and plaintiff's tender and demand were premature and she was not in a position to insist on a rescission of the contract or to maintain her action.

APPEAL by the defendants from a judgment of the Municipal Court of the city of New York, eleventh district, borough of Manhattan, rendered in favor of the plaintiff, after a trial had before the court, without a jury.

Charles C. Suffren (James M. O'Neill, of counsel), for appellants.

Roy, Watson & Naumer (George A. Meyer, of counsel), for respondent.

GIEGERICH, J. The action was brought by the plaintiff, the vendee in a contract for the purchase of certain real property against the defendants, the vendors, to recover back $300, a deposit made at the time of the contract.

On July 12, 1906, the defendants entered into an agreement with the plaintiff, whereby, in consideration of the sum of $7,400 to be paid by the latter, they agreed to sell

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to her a certain piece of real estate situate on the easterly side of East Tenth street, distant 480 feet northerly from the intersection of the easterly side of East Tenth street with the northerly side of Avenue P, in the county of Kings of this State, subject to covenants and restrictions contained in former deeds. The consideration was to be paid as follows: $300 in cash on signing the contract (which was paid); $1,700 in cash on the delivery of the deed; $4,000 by the vendee giving a purchase money mortgage for that amount, which the vendors agreed to secure from the Title Guarantee and Trust Company without expense to the vendee, and $1,400 by the vendee giving a purchase money mortgage for that amount. The bonds and mortgages were to be drawn at the expense of the vendors who also agreed to pay the recording tax. The deed was to be delivered at the office of said Title Guarantee and Trust Company, 175 Remsen street, Brooklyn, N. Y., on August 3, 1906, at 10 A. M. The vendors agreed to deliver a full covenant warranty deed conveying the premises free from all incumbrances, except as above stated. The contract also contained a clause that the vendee was to paint and paper the interior of the premises at her own expense, for which an allowance of $100 from the original contract price was made, thus reducing the same to $7,400. The vendors agreed to pay for the policy of title insurance from the said Title Guarantee and Trust Company, and they also agreed to give and the vendee agreed to accept a title such as said Title Company would approve and insure.

At the time and place specified in the contract, the plaintiff appeared with her attorney, but neither of the defendants had then put in an appearance. Mr. Siegelman, an attorney in the employ of said Title Company, who had charge of the closing of the title, according to plaintiff's testimony, stated that he could not close the title because the defendants were not there and that she "would have to wait."

The plaintiff and her attorney did wait, but just how long is in dispute, the former testifying that she waited one hour and three-quarters, while Siegelman, on the other hand, testified that she did not wait any longer than half an hour. At

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all events, the defendants having failed to appear, the plaintiff's counsel tendered to Siegelman the amount due under the contract and demanded a deed; and, immediately thereafter, the plaintiff and her counsel left the office, saying that they could wait no longer and that, if the vendors came in, to inform them that the plaintiff would refuse to take title because the building was not ready.

It appears from the testimony that the defendants' failure to appear at the stipulated time was due to a mistake on their part as to the hour fixed for the closing of the title, they being under the impression that it was to take place at noon instead of ten o'clock in the forenoon. It seems that they had given the contract, which was executed in duplicate, to the attorney who drew it, a Mr. Colton, who was also connected with said Title Company, for the purpose of examining the title; and he testified that Mr. Brennan "rang him up about a quarter past ten o'clock and asked if the title was all ready to close" and that he informed him that it was; that the "people" were there, and to hurry right down. It further appears from the testimony of Colton and of Mr. Brennan that the former and the defendants arrived at said Title Company's office at about eleven o'clock, at which time the plaintiff and her counsel had already left. It was also shown on behalf of the defendants that, at the time so named for closing title, the Title Company had agreed to loan the said sum of $4,000, as stipulated by the defendants, and that it prepared and had ready for execution a bond and mortgage for that amount, had issued a policy of title insurance, had ready for execution the bond and mortgage for $1,400, as well as the deed of the premises; that all that was required in order to close the title was the presence of the defendants, and that they appeared within about one hour after the specified time able, ready and willing to perform the contract.

Two days after the time above stated, viz: on August 5th, the defendant Brennan wrote the plaintiff, stating, among other things: "I was sorry you could not wait at the Title Guarantee Co., as you had left when I got there. You know Mr. Colton had my contract, so, somehow, I mis-

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understood the time and thought it was to be at twelve o'clock. However, it would not have made much difference as, on account of the plumber's strike, we were unable to complete the work; and, under such circumstances, I could not expect to close title that day. The Title Company would not give title until it was completed. The plumbers are now working on the house and it will be completed in a few days. * * * I wish you would let me know when you can come down. When you do, you can make arrangements for closing title. If you would let me know the exact time you could come down, I could be sure to be home."

On August fifth, defendants' counsel wrote plaintiff: "Mr. Brennan has previously notified you that, owing to a strike on the part of his employees, the plumbing work could not be finished on the date originally agreed upon for the closing of this title; but the plumbing work has now been finished and the premises are ready for your immediate occupancy. If you are not ready to close title on August 10th, Mr. Brennan is willing to close title upon such day in the following week as may be agreeable to you. Please let me hear from you in reference to this matter at once."

No reply to either of these letters was sent by the plaintiff, and she commenced this action on August 18th to recover the $300, the sum deposited upon the signing of the contract. The answer was substantially a denial of all the material allegations of the complaint, except the receipt of the said sum of $300, and that the defendants had refused to repay the same to the plaintiff, and set up as a separate defense the plaintiff's alleged refusal to perform, although notified of the defendants' readiness to do so, and interposed a counterclaim for $283.74, damages for breach of contract by the plaintiff.

It appears from the return which, in conformity with the present practice (Mun. Ct. Act, § 317; Bev. & R. App. Ct. Pr. 20), contains all the proceedings including the evidence and the judgment, that the questions litigated upon the trial were whether, as claimed by the plaintiff, she could insist upon closing the title at the exact hour stated in the contract, or whether, as contended for by the defendants, "they had

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a certain leeway;" that time was not of the essence of the contract, and that, from their expressed willingness to close some time later, they were at liberty to do so and that there was no breach of the contract under those circumstances.

It further appears from the return that the justice, in giving judgment for the plaintiff, among other things, said:

"The only question in dispute was whether the plaintiff was justified in her position as to considering the contract for the sale of property, with the defendants, as broken by the defendants' failure to appear at the exact time stated in the contract.

"It cannot be disputed that the plaintiff was present at the time stated in the contract, or that she was ready, able and willing to perform at that time. The defendants claim to have been ready about one hour afterwards, although there is some doubt as to whether or not the defendants could actually have fulfilled their part of the contract at that time.

"It would seem, under the authority of Zorn v. McParland, 11 Misc. Rep. 555, affd., 155 N. Y. 684, without opinion, and Zirinsky v. Post, 112 App. Div. 74, that the plaintiff had the right to consider the contract broken when the defendants failed to be present at the time set for the closing. There, as in this case, no equitable intervention on the part of the court was asked for, and the question resolves itself into one strictly of law, as to whether or not a party has a right to rely upon the terms of a contract; and it would seem, under the authorities cited, that the plaintiff's contention in this regard is correct."

It will be observed that the justice disposed of the case upon the theory that, since the action was at law, the time named for the delivery of the deed was of the essence of the contract in suit and that the failure of the defendants to be present at such time constituted a breach of the contract which entitled the plaintiff to rescind the same.

The plaintiff seeks to uphold the judgment upon the same grounds.

While some of the earlier cases and even those cited by the justice seem at first glance to hold that, while in equity

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time is not regarded as of the essence of the contract, at law the rule is different, time there being always regarded as an essential element; yet, in the more recent cases and, as will hereafter appear, even those quoted by the justice, a broader and more just rule has now been adopted in actions at law.

In 29 American and English Encyclopedia of Law (2d ed., p. 694), it is said: "The rule is usually stated to be that at law time is always of the essence, and at all events time is always of the essence where there are no mutual remedies, or where the purchaser is buying for speculative purposes.

"The tendency of the modern cases, however, seems to be that, even at law, time is not of the essence unless it is expressly so stipulated by the parties, or unless it clearly appears from the circumstances of the case. And this would seem to be the most satisfactory rule."

Numerous adjudications in harmony with these views have been made in this State, notably in Dillon v. Masterson, 39 N. Y. Super. Ct., 133 and cases there cited; Myers v. De Mier, 52 N. Y. 647; Schmidt v. Reed, 132 id. 108; Zorn v. McParland, *supra;* Ziehen v. Smith, 148 N. Y. 558; Campbell v. Prague, 6 App. Div. 554; Higgins v. Eagleton, 155 N. Y. 466; Darrow v. Cornell, 30 App. Div. 115.

It will be seen, upon examination, that the rule laid down by these cases, viz.: that time is not of the essence of a contract, was applied to actions at law as well as in equity; Zorn v. McParland, Ziehen v. Smith, Campbell v. Prague and Higgins v. Eagleton, being actions at law to recover back the sum paid on signing the contract for the purchase of real property and for damages for breach of contract and where the defendant did not seek as affirmative relief specific performance of the contract.

In Zorn v. McParland, *supra,* which as noted was quoted by the justice and is relied upon by the respondent, the plaintiff, by an action at law, sought to recover the deposit made by him under a contract for the purchase of real estate, and for a further sum paid by him for examining the title, which was rejected on the ground of certain incum-

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brances affecting the title which, it was alleged, disabled the defendant from carrying out the sale.

The defendant did not set up any equitable defense as a counterclaim for the specific performance of the contract, but stood upon his strict legal right to retain money which had been paid to him by the plaintiff, on the ground that at law no recovery can be had, if the plaintiff was at fault in refusing to perform at the time fixed for that purpose.

It appeared there that, several days prior to the adjourned day for closing the contract, the counsel for the plaintiff notified the defendants' attorney that he would insist that the liens and charges upon the property should be discharged or released of record, on the day and at the time so fixed for closing the title. There was no claim that the notice was not sufficient, or that the defendant was ignorant of the matters upon which the objections of the plaintiff were founded. In this situation, the court said that the defendant was bound to comply with his part of the contract on the day fixed and, upon his failure to do so, the plaintiff was entitled to consider it at an end. In announcing such conclusion, the court cited the oft quoted rule: "The parties to a contract may by its terms make the time of performance essentially important, and its observance in that respect requisite to relief (Benedict v. Lynch, 1 Johns. Ch. 370). And when that is not so, either of the parties to the contract may, by a reasonable notice to the other party for that purpose render the time of performance as of the essence of the contract, and avail himself of forfeiture or default (Myers v. De Mier, 52 N. Y. 647)."

The court also quoted from that part of the opinion in Schmidt v. Reed, 132 N. Y. 113, which in effect states that the stipulated time of performance of a contract for the conveyance of land is of the essence of the contract.

An examination of the latter case, however, shows that the court, after quoting at length the rule last above set forth, said (p. 113): "Time was not necessarily of the essence of the contract in question. But the trial court found that the plaintiff notified the defendants on the 12th of November, 1888, that the mortgage would mature on the

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first of November, 1889, and that he would not accept a deed of the premises unless the defendants procured for him at the time fixed for the passing of the title, a proper and sufficient extension of the mortgage until November, 1891, and upon that fact the court determined that such motion made time of the essence of the contract."

The case of Ziehen v. Smith, *supra,* which was brought by the vendee of real estate against the vendor to recover damages for a breach of contract to convey, and for the return of money paid, illustrates the tendency of our law courts to depart from the former rule applied in actions at law requiring performance of the contract at the specified time. In some of the cases, especially Morange v. Morris, 3 Keyes, 148; Ingalls v. Hahn, 47 Hun, 104, it had been held that the existence, at the date fixed for performance, of some liens or encumbrances of the property was sufficient to sustain an action by the vendee to recover the part of the purchase money paid upon the contract. The court, however, held that mere existence, on the day fixed for closing the title, of an incumbrance upon the property which it was within the power of the vendor to remove, did not constitute a breach of the contract. In Campbell v. Prague, *supra,* the action was brought to recover damages for the breach of a contract to convey certain real property free from all incumbrances save a mortgage bearing interest at five per cent. It appeared that the transaction was to be closed at eleven o'clock on a certain day, at the office of the vendor's representative, and that, at the day and hour appointed, the vendee and his counsel appeared at that office, but, owing to a mistake as to the hour, the vendor was not present. After waiting awhile, the vendee tendered the purchase money to the vendor's representative and demanded a deed, which was refused because of the absence of the vendor. The vendee's counsel asked that the matter be adjourned, and this request was refused upon the ground that the vendor was expected every minute. There was a conflict in the evidence as to whether this request for the adjournment was made before or after the tender. The vendee and his counsel waited thirty-five minutes; and, when about to leave, his

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counsel was asked by the vendor's representative how long he would be in his office, as he (the vendor's representative) expected the vendor in a few minutes and would come to the office of the vendee's counsel with the vendor and close the matter. The vendee's counsel finally said he would be at his office until half-past twelve. Thereupon the vendee and his counsel left the office; and, five minutes later, the vendor arrived and went with his representative to the office of the vendee's counsel, but did not find the vendee there.

Upon the trial it appeared that, at half-past twelve on the day fixed for closing the title, there were charges for taxes and water rates, which were liens upon the premises, but that the vendor had given his representative money to pay such charges. It also appeared that the mortgage, subject to which the vendee was to take title, on its face bore interest at six per cent.; but that the vendor had an understanding with the mortgagee and could have procured a written agreement that the rate of interest was to be reduced to five per cent.

The vendor asked to go to the jury upon the question whether the vendee had waited a reasonable time for the closing of the sale; but the court denied the request and directed a verdict for the vendee.

Upon appeal to the Appellate Division, it was held that such direction was improper.

The attention of the court in Campbell v. Prague, *supra*, does not, so far as the opinion discloses, seem to have been called to the decision of Zorn v. McParland, *supra;* but it sufficiently appears from the opinion of the court that it did not regard the time named for the delivery of the deed as of the essence of the contract. This view finds confirmation in the statement contained in the opinion that the mere fact of the non-existence upon the day of performance of an instrument evidencing the reduction of the interest did not of itself work a breach of the contract and, further, that one of the questions presented by the evidence was whether the plaintiff remained a reasonable time at the office of the attorney for the vendor and whether his tender and demand there were not, under all the circumstances, premature and pre-

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cipitate. The case of Higgins v. Eagleton, *supra*, so far as I can discover, is the latest utterance of the Court of Appeals upon the subject under discussion.

There the deed was to be delivered on or before June 15, 1892, at a place named in the contract. On the day named, the parties met and the plaintiff declined to take the title offered for the reason then given that the premises were incumbered by a certain easement and a mortgage and unpaid taxes and water rates.

Thereupon, the plaintiff gave notice that he declined to take the premises and elected to rescind the contract and demanded the return of the sum deposited upon signing the contract. Nine days later, the plaintiff brought suit to recover the sum so deposited for a breach of the contract by the defendant.

Upon the trial, the defendant asked the court to submit to the jury the question whether the plaintiff was justified in refusing to accept the title tendered. The request was refused and the defendant excepted. The court then directed a verdict for the plaintiff for the amount of the deposit and damages; and, from the judgment subsequently entered, the defendant appealed to the General Term of the Court of Common Pleas, which affirmed the judgment.

In reversing the judgment the Court of Appeals said (p. 472): "In this contract there was no express stipulation making prompt performance, or performance upon the day named, any part of the substance of the agreement. So that, manifestly, time was not of the essence of the contract. Under these circumstances, with the offer of the defendant by release and removal of the objectionable beams, to make the title to the premises absolutely good, it is clear that the plaintiff was not in a position to insist upon a rescission of the contract, or to recover damages or the purchase price paid by his assignor."

The case of Zirinsky v. Post, 112 App. Div. 74, which was also cited by the justice and is relied on by the plaintiff, is not, as claimed by the plaintiff, opposed to the view that in actions at law time is not necessarily of the essence of a contract for the sale of real property. There the vendee,

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after waiting one hour for the vendors to appear at the time and place designated for passing the title, tendered, in their absence, the amount due to the person in charge of the office and demanded from him the deed of the premises which was refused; and he brought an action at law to recover the sum paid on signing the contract.

The vendors never appeared nor tendered the deed and subsequently sold the property at an advanced price.

Judgment in favor of the plaintiff was rendered by direction of the court; and in affirming it Woodward, J., speaking for the Appellate Division, among other things (at p. 75), said: "If the defendants presented any equities it might be that the court would be disposed to disregard the exact time, and to hold that a substantial compliance was all that was necessary; but in the case at bar it is conceded that the defendants subsequently sold the property at an advance in price, and their effort to keep the $500 paid by the plaintiff, where they are alone in default, hardly calls for any effort on the part of this court to interfere with the judgment, and we find no case which would warrant such interference."

The vendors, by conveying the property, placed themselves in such a position that they were unable to perform and the vendees could, therefore, without formal tender and demand on their part, maintain an action to recover the money paid on the contract or for damages. Ziehen v Smith, *supra.*

In the present case, however, we have no such situation The defendants, as above shown, were at all times subsequent to their tardiness in appearing on the day named able, ready, and willing to perform the contract on their part, and notified the plaintiff to that effect; but she, it seems, wholly ignored all such notices.

From what has been said, it is plain that the disposition of the Zirinsky case turned upon the subsequent sale of the property by the vendors.

The above-quoted remarks, however, clearly indicate that the court did not regard the time appointed for the delivery of the deed of the essence of the contract; and there runs

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through the entire opinion a suggestion that, if the vendors had presented any equities, although the action was at law, they would have been relieved from their default in appearing at the appointed time and place.

That the same feeling has long been entertained by the courts of this State has abundantly been shown by the cases above cited.

It is a matter of common knowledge and experience that the closing of titles to real estate is attended with more or less delay, and it might almost be said that they are usually not passed on the day originally fixed. Consequently, it would be a great hardship to those interested in the transfer of titles to real property to be held to the prompt performance of contracts for the sale thereof at the precise hour and minute named, under penalty of forfeiting all their rights thereunder and this without any previous notice or agreement that time was to be deemed as of the essence of the contract.

This difficulty, as seen, has been overcome by the application of more liberal and just principles in modern decisions affecting litigations arising out of real estate transactions in courts of law (thereby approximating the principles originating in courts of equity); so that it may now be stated as a recognized rule that, in actions at law to recover the deposit or for damages, the time appointed for the delivery of the deed, under an agreement for the sale of real property, will not be regarded as of the essence of the contract, although a precise day and hour are fixed, unless the contract contain an express stipulation making performance upon the day and hour named the substance of the agreement, or, where, previous to the day set for the closing of the title, reasonably sufficient notice has been given to the vendor that, for certain specified reasons, prompt performance of the contract is required.

Applying the general rule above stated (for the plaintiff failed to prove any exceptional facts which would take this case out of the general rule), it is obvious that the time fixed for the delivery of the deed was not of the essence of the contract.

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The contract does not contain any stipulation making prompt performance any part of the substance of the agreement, nor was any notice given before the time specified for the delivery of the deed that prompt performance was required. Time was, therefore, not of the essence of the contract, and, since it was not, the justice erred in holding, as he did, "that the plaintiff had the right to consider the contract broken when the defendants failed to be present at the time set for the closing."

Moreover, no evidence was adduced that the delay caused by the tardy arrival of the defendants would have made any material difference to the plaintiff, if the deed had been delivered after such arrival, nor that the plaintiff would have suffered any damage, if the closing of the title had been delayed for a few days after the day named.

Since testimony was adduced in behalf of the defendants that the failure to appear at the precise hour designated was not due to any intentional fault on their part and, consequently, was excusable, and as there is no proof that the plaintiff was damaged by their delay in appearing or would have been damaged had she taken title a few days later than the one specified therefor, the justice was not warranted in determining, as matter of law, that the rights of the defendants were lost by their failure to appear at the appointed hour.

As the action was predicated upon the defendants' alleged breach of the contract, the burden is upon the plaintiff to show that she demanded performance at a time when they were bound to comply and under circumstances which indicate that they were unable to perform. Campbell v. Sprague, *supra*, 558.

It is undisputed that at the stipulated hour all the papers required to be drawn by the defendants were in readiness for execution; the policy of title insurance had been issued and all that was necessary to close the matter was the presence of the defendants to sign and acknowledge the deed. As will hereafter more fully appear, if the latter had been present, the contract, so far as it related to the covenants and conditions on their part, could then have been fully

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performed. It is therefore manifest that, if the delay of the defendants in appearing at the stipulated time was excusable and the plaintiff's tender and demand were premature and precipitate, she was not in a position to insist upon a rescission of the contract or to maintain this action.

The facts in relation to the failure of the defendants to arrive promptly at the appointed time and place have already been discussed at considerable length and more would not be required were it not for the point urged in the brief of plaintiff's counsel that Siegelman testified that he did not see Mr. and Mrs. Brennan on the day fixed for closing the title; but this is explained by the testimony of Colton that, when they arrived at his office, the plaintiff and her attorney had already departed. In this situation he did not deem it necessary to send the parties to Siegelman's office. The good faith of the defendants in the matter is sufficiently evidenced by their telephoning to Colton for the purpose of learning the exact hour of closing and their immediate departure for his office when they were told "to hurry right down." If Colton neglected to notify them of the time set for the passing of the title, or to send word to Siegelman that they had started for the Title Company's office, they should not, under such circumstances, be the sufferers.

In this connection, it should be borne in mind that Siegelman testified that the Title Company in question was a large institution and had a great many departments, and this may have been the reason why Colton failed to inform Siegelman that the defendants and Mr. Brennan were on the way.

Regarding the tender and demand of the plaintiff, in view of certain undisputed testimony, I cannot bring my mind to any other conclusion than that the tender was made merely for the purpose of rescinding the contract. The evidence, in my opinion, discloses a design on the part of the plaintiff not to take title to the premises, even though she may have gone through the form of making a tender and demand. It appears, without contradiction, from the testimony of Siegelman, that, although the plaintiff and her attorney were informed on the day fixed for closing the title that the defendants would be prepared to perform upon their

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arrival, the attorney stated: "Well, we are not going to wait here very long; we are ready to close this matter; we have the money now," and then started to tender the money. After being requested to wait a few minutes, the plaintiff and her attorney waited, but how long, as above shown, is in dispute. However, they left before the arrival of the defendants and Mr. Brennan, and in leaving stated to Siegelman that, if the defendants came in, to inform them "that the plaintiff would refuse to take title because the buildings were not completed, as called for in the contract."

The record is barren of any proof that, prior to this time, the plaintiff ever requested the defendants to expedite the making of repairs or improvements or made any mention of them until the title was to be closed, although she must have known that they were not finished before going to the Title Company's office on the day in question; at any rate it does not appear that she there obtained such information.

As a matter of fact, however, the contract does not require the defendants to put the building in repair, although the defendant Brennan was under the impression when she wrote the letter of August fifth that "the Title Company would not give title until it was completed." That she is mistaken is evidenced by the issuance of the policy of title insurance by the Title Company in question and its readiness to pass the title at the stipulated time.

If the plaintiff had been willing to take title, she would have waited a little while longer for the defendants on the day in question, when requested to do so, or, if she could not then wait, she would have arranged to take title later, as proposed in the letters of Mrs. Brennan and her attorney.

All of the foregoing evidence has an important bearing upon the good faith of the plaintiff in making the tender and demand in question as well as upon the question whether or not, under all the circumstances, the same were premature and precipitate.

In this view, the defendants should have been permitted to show that the plaintiff never intended to take title to the property; but, since they did not except to the ruling of the justice in excluding the same, the point cannot be consid-

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ered upon this appeal. Huck v. Bischoff, 84 N. Y. Supp. 173; Bev. & R. App. Ct. Pr., 80.

Summing up the result of my examination of the facts of the case, as disclosed by the return, in the light of the rule so deduced from the authorities, my opinion is that time was not of the essence of the contract in controversy; that the failure of the defendants to be present at the time and place agreed upon for the closing of the title did not of itself constitute a breach of the contract and entitle the plaintiff to rescind the same, and to maintain this action, and that, if they had been present, they would have been able, ready and willing to fully perform the contract on their part, as they were, subsequently, when they notified the plaintiff as above stated.

The judgment should, therefore, be reversed and a new trial ordered, with costs to the appellants to abide the event.

GILDERSLEEVE and ERLANGER, JJ., concur in result.

Judgment reversed and new trial ordered, with costs to appellants to abide event.

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MEMORANDA

OF

CAUSES NOT REPORTED IN FULL.

SUPREME COURT, APPELLATE TERM. MARCH, 1907.

HUGH B. GREER, Respondent, *v.* THE UNION RAILWAY COMPANY, Appellant.

Carriers — Carriage of passengers — Liability for personal injuries to passengers — Actions by passengers for personal injuries — Instructions — As to damages.

APPEAL by the defendant from a judgment for $301.50, entered in plaintiff's favor in the Municipal Court of the city of New York, second district, borough of the Bronx.

William E. Weaver, for appellant.

Headley M. Greene, for respondent.

Per Curiam: Defendant appeals from a judgment for $301.50 in favor of the plaintiff, entered upon the verdict of a jury. The judgment should be reversed because of erroneous instructions to the jury contained in the charge of the learned justice presiding. In explaining the rule of damages to be applied in the case, the court said: "A good many jurors do put themselves right in his place and say: What under the circumstances would I want for injuries and sufferings of that kind." Proper exception was then taken to this part of the charge, and the court thereupon added: "Not what they would take, what they would want." Exception was also taken to this statement.

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This error was doubtless prejudicial. Stantial v. Union R. Co., 52 Misc. Rep. 653; Schmidt v. Interborough R. T. Co., 49 id. 255; Rhodes v. Union R. Co., 52 id. 501.

Present: GILDERSLEEVE, DAVIS and HENDRICK, JJ.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

FININ SACHS, Appellant, *v.* SAMUEL LYONS, Respondent.

Evidence — Judicial notice — Ordinances.

APPEAL by the plaintiff from a judgment in favor of the defendant rendered in the Municipal Court of the city of New York, ninth district, borough of Manhattan.

Herman Roth, for appellant.

Jacob Levy, for respondent.

Per Curiam: Appeal from a judgment rendered in favor of defendant dismissing the plaintiff's complaint and awarding the defendant thirty-two dollars and eighteen cents as a counterclaim. The case was tried by the court without a jury. The plaintiff sought to recover the value of certain goods which the defendant, as a carter, was to bring to him from the Pennsylvania Railroad Company. The goods were brought to plaintiff's store about nine-thirty P. M. At that time plaintiff's employee refused to receive them. They were then brought to the store the next morning. The driver would not deliver the goods until he got a receipt and his pay. Plaintiff would not agree to this. The defendant then took the goods away and stored them. Hence this suit for the value of the goods. Defendant interposed a counterclaim for his charges and storage amounting to thirty-two dollars and eighteen cents. The right to this counterclaim was based upon section 10 of a city ordinance but no ordinance was proved as required by section 941, Code of Civil Procedure. So far as we

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can discover no court takes judicial notice of a corporation ordinance. Porter v. Waring, 69 N. Y. 250. Nor was there the least proof of any counterclaim.

Present: GILDERSLEEVE, DAVIS and HENDRICK, JJ.

Judgment reversed and new trial granted, with costs to appellant to abide event.

WILLIAM GRAHAM, Respondent, *v.* ERSKINE VAN HAUTEN, Appellant.

Master and servant — Master's liability for injury to servant — Risks assumed by servant — Negligence of fellow servants — Master's assurance of safety.

APPEAL by the defendant from a judgment in favor of the plaintiff, rendered in the Municipal Court of the city of New York, sixth district, borough of Manhattan.

Frank Verner Johnson, for appellant.

Abraham Oberstein, for respondent.

GILDERSLEEVE, J. Plaintiff recovered a judgment for injuries received by him caused by a falling brick striking him on the head while at work for the defendant on a building. There was sufficient evidence from which it could be said that the falling of the brick was caused by some of the defendant's workmen then engaged in work over the floor upon which the plaintiff was at work. Plaintiff was removing dirt from the floor and conveying it in a basket out on a platform in front of the house and workmen were over him. He was directed by the defendant's foreman to do this work and was assured there was no one at work overhead, that the workmen engaged on the upper floor had gone for the day. Upon this assurance of safety he continued his work and while at work received the injury. The appellant only claims that the injury was caused by the negligence of a fellow servant; but he fails to note

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that the plaintiff had an absolute assurance of his safety, and thus the defendant is liable.

The judgment should be affirmed, with costs.

DAVIS and HENDRICK, JJ., concur.

Judgment affirmed, with costs.

PAUL GUMBINNER, Respondent, *v.* FRANK B. BURNS et al., Appellants.

Municipal courts — Procedure — Relief from default.

APPEAL by the defendants from a judgment taken by default in the Municipal Court of the city of New York, tenth district, borough of Manhattan, and also from an order denying a motion to open said default.

Robert L. Turk, for appellants.

Arthur K. Kuhn, for respondent.

Per Curiam: The defendants have appealed from a judgment entered against them by default, and also from an order denying a motion to open the default and vacate the judgment. The action is for goods sold and delivered to the defendants as copartners. We think that the motion to open the default should have been granted. On the day before the inquest was taken, defendants' counsel had been notified to go on with the trial of a case in the Supreme Court on the next day, December nineteenth. It also appears that defendants' attorney had to answer a motion on the calendar of Part One, Special Term of the Supreme Court, on the nineteenth. In view of these facts we think the motion to open the default should have been granted. The order denying the motion to open the default and vacate the judgment is reversed, with costs to appellant to abide the event. The appeal from the judgment is dismissed, without costs.

Present: GILDERSLEEVE, DAVIS and HENDRICK, JJ.

Order denying motion to open default and vacate judgment reversed; appeal from judgment dismissed.

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THE THOMAS P. BEALE FURNITURE COMPANY, Appellant, *v.* JAMES J. MCGRORTY, Respondent.

Set-off and counterclaim — Subject-matter — Claim on contract against claim founded on tort.

APPEAL by the plaintiff from a judgment rendered in the Municipal Court of the city of New York, eleventh district, borough of Manhattan.

Porter & Barnes, for appellant.

William G. McGrorty, for respondent.

DAVIS, J. This action was brought to recover damages for the conversion of certain articles of furniture. The defendant denies the conversion. He admits that the furniture was delivered to him, but asserts that it was not the furniture ordered by him and that he repeatedly notified the plaintiff to take it away from his place of business. Defendant's contention on this point was fully sustained by the evidence. In fact it was not denied by the plaintiff. However, the court decided that there was a conversion, but sustained a counterclaim interposed by the defendant for storage of the furniture and rendered judgment for nine dollars in favor of the plaintiff — nine dollars being the difference between the claim of the plaintiff and the storage charges claimed by the defendant. The plaintiff, objecting to the allowance of the storage charges, appeals from the judgment. The judgment is necessarily based upon a finding of a conversion of the furniture by the defendant. This being so, the allowance of the counterclaim was improper. The conversion by defendant is inconsistent with a claim of storage charges, and such a counterclaim cannot be proved in an action of conversion.

The judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

GILDERSLEEVE and HENDRICK, JJ., concur.

Judgment reversed and new trial granted, with costs to appellant to abide event.

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MARGARETHA HERING, Appellant, *v.* THE LAND & MORTGAGE COMPANY, BOHEMIA, OF THE CITY OF NEW YORK, Respondent.

Stipulations — Relief from stipulations — Grounds for relief.

APPEAL by the plaintiff from a judgment and order of the Municipal Court of the city of New York, ninth district, borough of Manhattan.

M. Strassman, for appellant.

Chas. Melville Weeks, for respondent.

Per Curiam: This action was brought to recover $500 damages for personal injuries. The cause came on for trial October 9, 1906, and the defendant made default. An inquest was thereupon taken and judgment rendered on the same day for $25 in favor of the plaintiff. At defendant's request the plaintiff agreed to open the default and restore the case to the calendar for trial October 30, 1906, upon the payment of $10. This stipulation was in writing and was filed October 10, 1906. On October 30, 1906, plaintiff was in court with her witnesses and ready to proceed. Defendant, however, asked to be relieved of its stipulation opening the default and offered to pay the $25 theretofore awarded upon the inquest. The plaintiff objected to this motion of the defendant, but the court granted the motion on the full payment of the judgment taken by default and from this order the plaintiff appeals. "The authority of the court to relieve a party from a stipulation is the exercise of a judicial discretion which may not be invoked without cause shown." Morris v. Press Pub. Co., 98 App. Div. 143. There is nothing in the record to show that the stipulation was thoughtlessly or improvidently made. Indeed there is no fact shown from which we can infer any reason for setting aside this stipulation. At the time the stipulation was set aside, plaintiff's right to move to vacate the judgment for insufficiency, under section 254 of the Municipal Court Act and, of course, her right to appeal

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were gone. She is thus actually forced to accept $25 from the defendant and end the litigation. She relied upon the defendant's promise to retry the issues and gave up her right to move to vacate the judgment. The harsh inequality of the situation is thus obvious. The court below had no authority to disregard the stipulation. The order, however, is not an appealable one. White v. Lawyers Surety Co., 84 N. Y. Supp. 247; Pascello v. Brooklyn Hgts. R. R. Co., 26 Misc. Rep. 412.

The appeal will, therefore, be dismissed without costs; and the appellant should move in the court below to set aside the order appealed from and to restore the case to the calendar for trial.

Present: GILDERSLEEVE, DAVIS and HENDRICK, JJ.

Appeal dismissed, without costs.

SUPREME COURT, APPELLATE TERM, APRIL, 1907.

JULIA COOGAN, by CATHERINE COOGAN, Her Guardian ad Litem, Respondent, *v.* THE INTERBOROUGH RAPID TRANSIT CO., Appellant.

Carriers — Carriage of passengers — Liability for personal injuries to passengers — Condition and care of premises — Duty to warn passengers.

APPEAL by the defendant from a judgment of the Municipal Court of the city of New York, first district, borough of Manhattan, rendered in favor of the plaintiff after a trial had before a jury.

Charles A. Gardiner (J. Osgood Nichols, of counsel), for appellant.

John B. Doyle, for respondent.

Per Curiam: We can discern no material difference between the facts as presented in this record and as presented

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at the first trial, which, as in the present case, resulted in a judgment for the plaintiff. The first judgment was reversed by this court with an opinion reviewing the evidence at considerable length. 50 Misc. Rep. 562. The same condition, especially with respect to the question whether or not a warning was given by the guard, exists in this record as appears by the opinion to have existed before.

Present: GILDERSLEEVE, GIEGERICH and ERLANGER, JJ.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

WILLIAM KAPLOWITZ, Respondent, *v.* THE INTERBOROUGH RAPID TRANSIT COMPANY, Appellant.

Carriers — Carriage of passengers — Liability for personal injuries to passengers — Condition and care of premises — Means of ingress and egress — Constructive notice to carrier.

APPEAL by the defendant from a judgment in favor of the plaintiff rendered in the Municipal Court of the city of New York, second district, borough of The Bronx.

Charles A. Gardiner (Alfred E. Mudge, of counsel), for appellant.

Henry Waldman, for respondent.

Per Curiam: The judgment should be reversed on the authority of Scholtz v. The Interborough R. T. Co., 48 Misc. Rep. 619; Idel v. Mitchell, 158 N. Y. 134, and Benson v. Manhattan Ry. Co., 31 Misc. Rep. 723. The case does not come within the authority of Cooley v. Trustees of the N. Y. & B. Bridge, 46 App. Div. 243, as in that case it appeared affirmatively that "the occasion of the fall was a pile of dirt, composed of earth, banana peelings, cigar stumps, etc., situated on the fifth or sixth step from the bottom of the stairs, and about three inches in depth and eighteen inches long," and it also appeared affirmatively that defendant's servant had previous to the accident swept

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the dirt from step to step, an inference being deducible therefrom that the said servant was responsible for said pile of dirt which caused the accident; while in the case at bar the evidence shows that, although there was much dirt upon the stairs, the plaintiff fell on a piece of tobacco; and there is nothing to indicate that the said tobacco had been there a sufficient length of time to impute notice to defendant.

Judgment should be reversed and a new trial ordered, with costs to appellant to abide the event.

Present: GILDERSLEEVE, GIEGERICH and ERLANGER, JJ.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

CHAIM BLOCK, Appellant, *v.* HANNAH OTTENBERG, SIMON OTTENBERG and IRVING S. OTTENBERG, Respondents.

Discontinuance — Grounds and objections — Accrual of substantial right to defendant.

APPEAL from an order of the City Court of the city of New York denying plaintiff's motion for leave to discontinue the action.

Herman Gettner, for appellant.

Ezekiel Fixman and Clarence M. Lewis, for respondents.

ERLANGER, J. The order should be affirmed. Admitting that the authorities abundantly establish a plaintiff's right to discontinue an action whenever after issue joined he shall determine so to do, the authorities are equally clear that the rule is subject to successful objection on the part of a defendant where either a counterclaim has been interposed, "or when equities exist which might be defeated, or a defendant otherwise prejudiced, if the leave to discontinue was granted." Telephonine Co. v. Douthitt, 115 App. Div. 362. The answers set up an affirmative defense, sufficient, if alleged by way of complaint, to hold the plaintiff

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for conversion of the very note upon which he seeks to recover in this action. The affidavit of Mr. Elkan, the facts of which are not denied, shows that the plaintiff became possessed of the note under circumstances which make such possession wholly unlawful. The court, very properly in the circumstances, exercised its discretion in denying the leave asked for by plaintiff. In Matter of Petition of Butler, 101 N. Y. 309, Judge Finch said: "A party should no more be compelled to continue a litigation than to commence one, *except where substantial rights of other parties have accrued and injustice will be done to them by permitting the discontinuance.*" The opposing papers satisfactorily show that substantial rights have accrued and that injustice would be done by granting the motion. We see no reason for interfering with the order made by the court below.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Order affirmed, with costs and disbursements.

HYMAN FECHTER, Respondent, *v.* ADOLPH SCHONGER et al., Appellants.

Landlord and tenant — Rent and advances — Rights and liabilities — Eviction — Liability of assignee thereafter.

APPEAL by the defendants from a judgment in favor of the plaintiff rendered by the Municipal Court of the city of New York, thirteenth district, borough of Manhattan, upon a trial had before the court, without a jury.

Salter & Steinkamp (Jacob Stiefel, of counsel), for appellants.

Nathan Greenbaum, for respondent.

GIEGERICH, J. The plaintiff by this action seeks to hold the assignees of a lease liable for rent falling due after their

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removal from the demised premises. The assignment to the defendants does not contain any agreement or covenant on their part to pay the rent or to perform the covenants of the lease; and, therefore, they are liable for the rent only for the period they were in possession. Dassori v. Zarek, 71 App. Div. 538, and the cases there cited. Since the rent was paid up to the time the defendants vacated the premises, the justice erred in giving judgment in plaintiff's favor.

The judgment should, therefore, be reversed and a new trial ordered, with costs to the appellants to abide the event.

GILDERSLEEVE and ERLANGER, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellants to abide event.

ARCANGELLO ALTIERI, Respondent, *v.* PASQUALE TROTTA, Appellant.

Municipal courts — Review — Judgments and orders reviewable — Judgment by default without service of summons.

APPEAL by the defendant from a judgment in favor of the plaintiff rendered in the Municipal Court of the city of New York, sixth district, borough of Manhattan.

John C. Oldmixon, for appellant.

Frank A. Acer, for respondent.

Per Curiam: The judgment was taken by default. The defendant appeals on the ground that he never was served with the summons and has never appeared in the action. This claim seems to be supported by a preponderance of proof. The defendant has adopted the proper practice in appealing directly to this court. Mun. Ct. Act., § 311; 49 Misc. Rep. 456.

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The judgment must be held to be invalid, and reversed and complaint dismissed, with costs to appellant.

Present: GILDERSLEEVE, GIEGERICH and ERLANGER, JJ.

Judgment reversed and complaint dismissed, with costs to appellant.

MARY A. C. HALLAHAN and Another, Landlords-Respondents, *v.* THE CAMBRIDGE HOTEL COMPANY, Tenant, and ROLAND W. MCCURDY, Tenant-Appellant.

Municipal courts — Review — Judgments and orders reviewable — Order denying motion to vacate appearance.

APPEAL from an order of the Municipal Court of the city of New York, fourteenth district, borough of Manhattan.

Myers & Goldsmith, for appellant.

Earley, Weaver & Earley, for respondents.

Per Curiam: The tenant McCurdy in this proceeding moved in the Municipal Court for an order vacating and cancelling his appearance, noted upon the precept by indorsement thereon, and appeals from the order made denying his motion. He has adopted a mistaken remedy. The order appealed from is not one of the orders enumerated in sections 253–257 of the Municipal Court Act and is, therefore, not appealable. White v. Lawyers Surety Co., 84 N. Y. Supp. 247.

Present: GILDERSLEEVE, GIEGERICH and ERLANGER, JJ.

Appeal dismissed, with ten dollars costs.

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APPEAL.

1. *Who may appeal — Persons not parties.*— The owners of the equity of redemption of property of which a receiver has been appointed are entitled to appeal from an order denying them leave to come in as parties defendant, and a motion to compel acceptance of their notice of appeal will be granted. Dewsnap v. Matthews, 48.

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APPEAL — Continued.
2. *Review — Matter not in record — Conclusiveness of return.* — It *seems*, that, upon the hearing of an appeal from a conviction in a police court, the return of the magistrate cannot be attacked collaterally. People v. Cimini, 525.

3. *Saving questions for review — Motions — Necessity — Necessity of motion to dismiss.* — The omission of the defendant to move for a dismissal of the complaint at the close of the whole case is not a waiver of his right to maintain that evidence, to the admission of which objection and exception were duly taken, was incompetent and inadmissible. Bjorkegren v. Kirk, 560.

4. *Saving question for review — Objections and exceptions in general. Necessity — Instructions.* — Where no exception is taken to the charge of the court, a judgment will not be reversed upon the ground that instructions to the jury were legally inaccurate. Kaplan v. Shapiro, 606.

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2. *Affidavit to obtain attachment — Affidavit for attachment against foreign corporation.* — Since an affirmative allegation that defendant is a foreign corporation would suffice to establish the fact upon a trial in the absence of an affirmative allegation that the defendant is not a corporation, such a positive and unqualified allegation in an affidavit to procure an attachment is a sufficient foundation therefor. Simons v. Lehigh Mills Co., 368.

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See Attorneys.

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ATTORNEYS.

1. *The relation with the client — Lien: Right to lien — In what courts lien may be acquired; Enforcement — By action in Supreme Court.*— Although the Municipal Court of the city of New York has no jurisdiction to enforce an attorney's lien, an attorney who has rendered services in an action brought in that court is entitled to a lien under section 66 of the Code of Civil Procedure and may maintain an action in the Supreme Court to enforce it. Tynan v. Mart, 49.

2. *The relation with the client — Compensation — Action — Presumptions and burden of proof.*— In an action by an attorney to recover for services rendered, where the defendant sets up a separate agreement that the attorney would render the services without any charge therefor, it is error for the court to refuse to charge that the burden of proof as to the separate agreement is on the defendant. Bogart v. Tannenbaum, 310.

3. *The relation with the client — Lien: Right to lien — Insanity of client as affecting lien; Enforcement — Determination of amount.*— While the relation of attorney and client is terminated by the judicial declaration that the client is an incompetent, the attorney has a lien upon bank books that came into his possession in the course of his employment; and an order directing the surrender of the books and papers in the attorney's possession to the committee of the incompetent's property should contain a provision directing the committee to retain in its hands sufficient funds to satisfy the amount which may be awarded on a reference simultaneously ordered to determine the amount of the attorney's lien. Matter of Stenton, 515.

BANKRUPTCY.

1. *Discharge of bankrupt — Debts affected — Debts improperly scheduled.*— Where a bankrupt in his schedules fails to state the street number of the residence of a judgment creditor which with reasonable diligence he could have ascertained, and, owing to such failure, the creditor receives no notice of the bankruptcy proceedings and denies any knowledge thereof, a motion to cancel his judgment will be denied. Cagliostro v. Indelli, 44.

2. *Discharge of bankrupt — Debts affected — Debts improperly scheduled.*— The recording of an assignment of a mortgage is not constructive notice thereof to the mortgagor; and, where a bankrupt, having no actual notice that the mortgage given by him had been assigned, scheduled the original mortgagee as the creditor, his discharge in bankruptcy is a defense to an action upon the accompanying bond. Mueller v. Goerlitz, 53.

3. *What passes to the assignee and the nature of his title — Effect of discharge of trustee.*—By the adjudication in bankruptcy and the appointment of the trustee a bankrupt is divested of all title to his property, and the trustee's discharge does not restore title to the bankrupt or his heirs. Kempner v. Bauer, 109.

4. *Discharge of bankrupt — Debts affected — Debts improperly scheduled.*— Upon defendant's motion to open his default in an action in which his defense was his discharge in bankruptcy where it appears he had stated in his schedules that plaintiff's address was unknown and he does not show in his moving papers that the omission to state plaintiff's address was due to his inability to discover plaintiff's whereabouts after reasonably diligent and honest effort on his part, the motion should be denied. Hitchings v. Simmons, 399.

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2. *Effect of bill — Effect of limiting the party's claim — Entirety of contract.*—Where, in an action to recover a balance due for services as an architect, the bill of particulars contained but a single item for plans, specifications, applications and permits for the defendant's premises, it is manifest that plaintiff elected to make the drawing of the plans an entire contract; and it appearing from the testimony that a set of plans for a fifty-foot building was prepared as a substitute for an old set for a twenty-five-foot building, no recovery may be had for preparing the first set though, in response to an inquiry by the trial justice, counsel stated, contrary to the bill of particulars, that plaintiff's claim was for drawing two sets of plans. Dunne v. Robinson, 545.

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BONDS.

Breach — What constitutes breach — Necessity for demand.— The bond containing an absolute guaranty of "prompt payment at maturity of each and all the notes * * * and other obligations in writing" of said corporation, no demand upon defendant was necessary before suit, although, by a subsequent clause, the sureties, in case of default of any of the obligations mentioned, covenanted and agreed to pay the same to the bank upon demand. First National Bank v. Story, 429.

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Breach — What constitutes breach. Heinemann v. Brasch, 552.

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BROKERS.

1. *Compensation — Performance of duty by broker — Necessity of procuring binding legal contract.*— Where a person produced by a real estate broker as a purchaser of certain premises declined to sign a contract therefor unless there should be inserted a provision that, in case he should reject title on account of certain encroachments, which would not otherwise have constituted a ground for such rejection, his deposit should be returned in full for all claims, the broker is not entitled to commissions, as the contract is thus rendered a mere option and he has not produced a party ready and willing to take the premises upon the terms proposed by the owner. Hough v. Baldwin, 284.

2. *Compensation — Agreements as to compensation — Payment when title is passed.*— Where, by express contract, the commissions of a real estate broker are not payable until title to the premises passes, and, because of defects found in the title, the contract of purchase is canceled and the deposit returned to the prospective purchaser, the real estate broker has no right to commissions. Couper v. O'Neill, 319.

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2. *Carriage of passengers — Liability for personal injuries to passengers — Actions by passengers for personal injuries — Admissibility of evidence — Report of accident.*— In an action against a street railway company for damages for personal injuries received in alighting from a car, where it appears that certain employees of defendant were witnesses of the accident but defendant has not called them, it is error to exclude the testimony of defendant's accident clerk which it offers upon the question whether he had received any report of the accident. McArthur v. New York City R. Co., 292.

3. *Carriage of passengers — Liability for personal injuries to passengers — Operation and management of vehicles of transportation — Care required to avoid collision with other vehicles — Instructions — Power of court and necessity — Duty of judge to charge — As to consideration of evidence of parties separately defending.*— Where a passenger on a street railway car is injured by a collision with a wagon and it appears that the driver had given the reins to a strange boy and had left his seat and the boy was not able, through want of skill, to control the team but ran the pole of the wagon into the car, causing the injury, the owners of the team in whose business it was engaged are liable for the damages and are not excused by reason of their having instructed the driver not to permit strange boys to ride with him. And where it also appears that the car did not lessen its speed when crossing the street but proceeded at a dangerous rate beyond the control of the motorman, who was instructing another man then with him and was not properly attentive to his duties while crossing an intersecting street, the question of the negligence of the company was properly submitted to the jury. But where the testimony in behalf of

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CARRIERS — Continued.
each defendant was given separately, the counsel for each sitting by and not examing or cross-examining the others' witnesses, and the railroad company thereafter requested the court to charge that, in determining the company's liability, the jury should not consider the testimony given on behalf of the owners of the wagon, it was error for the court to refuse so to charge; and a motion by the company for a new trial should be granted. Bamberg v. International R. Co., 404.

4. *Carriage of baggage and passenger's effects — In general — Limiting liability — Power of agent of passenger.*— Where the plaintiff's son, fifteen years of age, is intrusted with the duty of preparing her trunk for shipment and attending to checking it and he packs the trunk and binds it with a thick cord, he will be regarded as having authority to sign a release of liability reciting that the lock was off the trunk and the plaintiff will be bound thereby though he testifies that the trunk was in good order and that it was locked and that he did not read the paper he signed; that "everybody else signed it who rode" and that no explanation was made when it was presented to him. Kanevsky v. New York, Ontario & Western R. Co., 564.

5. *Carriage of passengers — Liability for personal injuries to passengers — Actions by passengers for personal injuries — Sufficiency of evidence as to negligence.*— Where a street car approaches a curve at a rapid rate and is derailed, negligence upon the part of the company is inferable. Ludinsky v. New York City R. Co., 569.

6. *Carriage of passengers — Liability for personal injuries to passengers — Actions by passengers for personal injuries — Sufficiency of evidence as to negligence.*— Where it appears in an action by a passenger to recover damages for personal injuries received by him in alighting from a street car that, after the car had stopped to allow him to alight and when he was in the act of alighting and had one foot on the ground, the car suddenly started and threw him down, it is error to dismiss the complaint. Klein v. New York City R. Co., 571.

Carriage of passengers — Liability for personal injuries to passengers — Actions by passengers for personal injuries — Instructions — As to damages. Greer v. Union R. Co., 638.

Carriage of passengers — Liability for personal injuries to passengers — Condition and care of premises — Duty to warn passengers. Coogan v. Interborough Rapid Transit Co., 645.

Carriage of passengers — Liability for personal injuries to passengers — Condition and care of premises — Means of ingress and egress — Constructive notice to carrier Kaplowitz v. Interborough Rapid Transit Co., 646.

CASE.
1. *Settlement — Who may settle — Judge who tried case though transferred to another court.*— A motion to resettle the case, on appeal from a judgment of the City Court of the city of New York so as to permit an excluded exhibit to be inserted therein, must be made before the justice who tried the case, though in the meantime he has been sworn in as a justice of the Supreme Court. Knobloch v. Taube, 543.

2. *Interpretation — Consideration of matters outside of record in general — Record on appeal in another action.*— The court in reviewing a judgment upon appeal cannot consider the record in another action unless offered and legally received in evidence in the case under review. Kahl v. New York City R. Co., 566.

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CERTIORARI.
See Taxes.

CODE OF CIVIL PROCEDURE.
§ 66. Tynan v. Mart, 49.
§ 375. Muller v. Manhattan R. Co., 133.
§ 713. Bimberg v. Wagenhals, 13.
§ 723. Thompson v. Young, 250.
§§ 870, 873. Tirpak v. Roe, 532.
§ 935. Goodman v. Greenberg, 583.
§ 997. Rosenthal v. Ball Realty Co., 265.
§ 1019. Burritt v. Burritt, 26.
§ 1019. Matter of Robinson, 171.
§ 1326. Sagehomme v. Pugh & Co., 41.
§§ 1421–1425. Krauss v. Merklee, 277.
§ 1665. Muller v. Manhattan R. Co., 133.
§§ 1667, 1668. Kellar v. Central Telephone & Telegraph Co., 523.
§ 1669. Salmon v. Blasier Mfg. Co., 36.
§ 1942. Kaplan v. Shapiro, 606.
§ 1948. Matter of Empire State Supreme Lodge, 344.
§ 2256. Chumar v. Melvin, 460.
§ 2546. Matter of Robinson, 171.
§§ 2703, 2704. Matter of Coope, 509.
§ 2713. Matter of Weaver, 244.
§ 3064. Coleman v. Keady, 520.
§ 3189. Tirpak v. Roe, 532.

CODE OF CRIMINAL PROCEDURE.
§§ 752, 754. People v. Cimini, 525.
§ 755. People v. Versage, 528.
§ 760. People v. Cimini, 525.

COMPLAINT.
See Pleading.

CONDEMNATION PROCEEDINGS.
See Eminent Domain.

CONTEMPT.
What constitutes — Disobedience — Excuse for disobeying generally. Sagehomme v. Pugh & Co., 41.
See Stay.

CONTRACTS.
1. *Interpretation of contract — Conditions precedent — Performance of conditions: Time of performance — Reasonable time; Waiver of conditions precedent.* — Where an instrument was signed by fifteen lot owners upon a city street, covenanting that all buildings to be erected upon such lots should be set back seven feet from the front of the lots and that such covenant should be deemed to run with the land, and further providing that the instrument should be of no effect until all the parties should have first executed and acknowledged the same, or the same should have been duly proved before a proper officer, and where three of the parties failed to acknowledge the instrument and the original certificate of proof as to them was defective for its failure to state the address of the subscribing witness, but eight years thereafter a proper and valid certificate proving the execution of the instrument by such parties was made; and where during such period eight of the parties conveyed their lots by deeds not mentioning such restrictions, held, that, the proof of execution not having been made

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CONTRACTS — Continued.
within a reasonable time nor until a majority of the signers had conveyed without recognizing its validity, the making of the certificate after the lapse of eight years was insufficient to give it validity. The fact of a general observance of the terms of the agreement after it had been disregarded for eight years and the voluntary placing of the buildings erected on the lots in conformity with its provisions will not serve to render it obligatory. Nor will the fact that defendant had notice of the agreement as recorded, since the record at the same time disclosed the want of due proof of execution which rendered the instrument ineffectual. Moreover, the change in the character of the neighborhood from a residential to a business locality since the instrument was originally signed would be a sufficient reason for refusing an injunction to enforce the covenant. Schefer v. Ball, 448.

2. *Contracts — Performance of contracts: Sufficiency of performance in general — Contracts with architects; Rights accruing on partial performance of contract — Waiver of failure to fully perform.* — Where defects and omissions run through the entire system of plans furnished by an architect so that they are useless for the guidance of builders, the architect is not entitled to any compensation therefor. Payment on account of the alleged services made without knowledge of the defective character of the plans did not constitute either an acceptance of the plans or waiver of defects. Dunne v. Robinson, 545.

3. *Performance of — To be performed to satisfaction of other party — With artists or actors.* — Where plaintiff agreed to render satisfactory services in her specialties at two performances each day for the period of one week and after one performance, consisting of singing and dancing, she is in good faith discharged because her services are unsatisfactory, a judgment in her favor for a full week's salary is unwarranted and erroneous. Parker v. Hyde & Behman Amusement Co., 549.

4. *Building and construction: Submission of question of performance to third person — Certificate of building department as condition precedent; Extra work — Right to additional compensation for extra work — Necessity of having written authority for extra work — Interpretation of — Conditions precedent — Effect of condition precedent and when deemed to have been fulfilled.* — Where a contractor abandons his contract and one who was working for him on the job goes on and completes it, at the request of the owner of the premises, and also performs extra work at prices agreed upon, the owner cannot defeat an action to recover the price, where he has written a letter to the plaintiff, at the time of making a payment to him on account, in which he has stated the price and the balance due on account thereof, on the ground that the order for the extra work was not in writing as required by the contract. And where it appears that the contract required the contractor to produce a certificate from the building department, though the defendant had made no objection at any time that such a certificate had not been produced, but that plaintiff had it and told the owner so and produced it upon the trial and offered it in evidence but it was excluded upon the objection of the defendant that it was not binding upon him, a judgment upon a verdict for the plaintiff should be affirmed. Clark v. Harris, 556.

5. *Actions on contracts: Sufficiency of complaint — Averments as to performance; Evidence — Admissibility of evidence — Effect of putting contract in evidence — Disclosure of condition precedent.* — In an action upon a building contract to recover the contract price, where

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CONTRACTS — Continued.
the complaint does not set out the contract in full and it appears, upon the production of the contract at the trial, that an architect's certificate is a condition precedent to the right of the contractor to require payment, the plaintiff cannot prove the unreasonable refusal of the architect to give a certificate which he has not pleaded. Where the introduction of such proof was objected to by the defendant and an exception taken to its admission, the complaint cannot be thereafter amended to conform to the proof. Bjorkegren v. Kirk, 560.

6. *Parties and persons by whom or against whom enforceable — In general — One not a party nor the person for whose benefit the contract was made.*— Where two persons form a partnership and one agrees to pay the other a sum of money in consideration of the latter's contributing his established business, and it is provided that the latter may terminate the partnership by paying the money to a third party from whom the former borrowed it, to enable him to enter into the copartnership, but the latter afterward throws out his partner without paying the money, the lender cannot maintain an action against him therefor, the right of action under the partnership agreement residing in the other partner, at whose suit the copartnership affairs can be fully adjusted and the rights of all parties conserved. Jarmulowsky v. Susskind, 603.

Interpretation of contract — Particular agreements — Agreements for sharing profits and losses on venture in stocks. Jones v. McNally, 59.

See Damages; Pleading; Vendor and Purchaser.

CONVERSION.

1. *Equitable — How and in what cases effected — By testamentary direction to sell realty — Direction not imperative.*— A power of sale contained in a will though not conferred in imperative terms, where its exercise is necessary to accomplish the testator's purpose and intention in the disposition of his estate, works an equitable conversion of his lands. Keyser v. Mead, 114.

2. *How and in what cases effected — Implication.*— There was no equitable conversion of the real property into personalty by the terms of the will, and the use of the words "pay over," in each of the clauses, which provided for the passing of each trust estate to the children of the life beneficiary, does not necessitate a construction to the effect that the trust estate must be converted into money by the trustees. Bascom v. Weed, 496.

See Wills.

CORPORATIONS.

1. *Personal liability of officers to creditors — In general — Liability of officers of foreign corporations.*— An action to enforce the liability under the statute of Maryland of a stockholder of an insolvent Maryland corporation for its debts must be brought in that State and lies only by a bill in equity in the nature of a creditor's bill filed against the corporation by one or more creditors on behalf of themselves and of other creditors of the corporation who may come in and make themselves parties thereto; and the complaint in an action brought in this State by a single creditor to enforce such liability will be dismissed for want of jurisdiction. Knickerbocker Trust Co. v. Iselin, 80.

2. *Power of corporation to make contracts and effect of ultra vires contracts — Incidental powers — Power of railroad company to maintain weighing machines at stations for use of passengers.*— A corpora-

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CORPORATIONS — Continued.
tion may engage in business incidental to its main business where it may become necessary, expedient or profitable in the care and management of its property. The privilege of maintaining weighing and vending machines in the stations of a railroad company is incidental to the operation of the road and affords a great source of revenue; and their use and maintenance is practically a universal custom. Where the city of New York, through its board of rapid transit commissioners, leases the subway to a railroad company without restriction or reservation as to the right of the lessee to maintain in its stations weighing and vending machines, such right passes to the lessee, so long as such machines do not in any way interfere with the use by the public of the railroad or deprive the public of any right to which it is entitled; and, where the proof shows that said machines are purposely placed where their obstructing or interfering with the public is absolutely impossible, the removal thereof will not be enjoined. City of New York v. Interborough Rapid Transit Co., 126.

3. *Incorporation and organization — Contents of articles.*— The certificate of incorporation of a hospital association is not invalidated by reason of a statement therein that the object of the corporation shall be erecting, establishing and maintaining a hospital *and dispensary* nor because it specifies an intention to receive persons who wish to pay for treatment. Matter of Roche, 187.

4. *Mode of entering into obligations, etc.— Liability on implied contract.*— Where a lawyer renders professional services, in a transaction relating to new interests which were coming into control of a corporation, upon the employment of one who assumed to act as its agent and with the knowledge of its officers and without objection on their part and without notice that the contract for his services is not recognized, and the corporation accepts the benefit of his services, it is liable therefor upon a *quantum meruit*. Bernstein v. Lispenard Realty Co., 273.

5. *Officers and agents: In general — Election of officers — Notice; Remedies to contest election — Notice of contest — Proof required — Estoppel.*— Where a corporation, organized pursuant to L. 1883, ch. 175, as a co-operative assessment association, is afterward reincorporated under the General Insurance Law (L. 1892, ch. 690) and its articles of incorporation provide for a board of directors whose number and term of office are not stated, the executive committee of the original corporation after the reincorporation not acting in pursuance of the provisions of the General Insurance Law, nor in pursuance of the General Corporation Law, have no power to adopt by-laws fixing the number and term of the directors. An election of directors, held pursuant to by-laws thus adopted and not published as required by subd. 5 of section 11 of the General Corporation Law, is invalid; and the directors are not legally elected nor entitled to administer the affairs of the company. Section 27 of the General Corporation Law, providing for the judicial review of elections of directors of corporations, is not limited in its application to stock corporations but applies to all kinds of corporations; and notice of the application for such review to the corporation and to the directors claiming to have been elected is a sufficient compliance with the requirement of notice to the adverse party or to those to be affected thereby; and notice to the policy holders of an insurance corporation is not required; and under that section the court has power, upon the application of policy holders, to annul an election without regard to the remedy by application to the Attorney General under section 1948 of the Code of Civil Procedure. Where the

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CORPORATIONS — Continued.
question is as to the legal right to hold any election at all, and not who received a majority of the legal votes cast, it is not required of the applicants to show that a new election would result differently. Nor are the applicants estopped from questioning the legality of the election because, after publication of a notice of an annual meeting without mention of any election, in the official organ of the association, they failed to appear at the meeting and object to the election; and failure to attend such meeting is not tantamount to acquiescence in proceedings taken thereat. By the re-incorporation under the General Insurance Law, the existence of the original corporation was not destroyed but it was continued under and subjected to the provisions of the Insurance Law; and the old officers remained in office and had the right to direct its affairs until their successors were chosen, and all by-laws not in conflict with the new law remained in force. The court should not take the management of the corporate affairs from such officers and confide it to the persons claiming to have been elected directors under the pretended election; but the latter should be ousted from control and the management of the corporate affairs should be returned to the former officers until a regular election can be had. Matter of Empire State Supreme Lodge, 344.

6. *Officers and agents — Transactions between corporations and officers, etc. — Contracts between corporations and officers or in which officers are interested.* — Where one who is the general superintendent and purchasing agent of a corporation and, part of the time, one of its directors engages in business secretly as a partner with another in manufacturing material used by the corporation in its business and the co-partnership does work for the corporation, to a large amount and finally sells out its plant to the corporation, which gives its notes therefor, the corporation, upon subsequently discovering the relation of its superintendent, agent and director to the co-partnership may maintain an action against the members for an accounting of the profits made by them upon the work of the corporation and the cancellation of its notes and will be entitled to an injunction during the pendency of the action restraining the defendants from negotiating or transferring the notes and from destroying the books or other records of the firm's business and restraining the payment to the former superintendent of the plaintiff of any part of the purchase price of the defendant's plant. Lozier Motor Co. v. Ball, 375.

7. *Foreign — Recognition, regulation and status — What is carrying on business.* — A foreign corporation which has no capital employed, nor goods stored, nor branch office within this State, although soliciting and taking orders here by commercial travelers, is not doing business within this State within the meaning of the General Corporation Law. Vio Chemical Co. v. Studholme, 470.

8. *Foreign Recognition, regulation and status — What is carrying on business; Actions and proceedings — Issues and proof.* — The plaintiff, a Michigan corporation engaged in buying and selling fruit, under an arrangement with defendant, a commission man and fruit dealer at Buffalo, N. Y., bought peaches in Michigan and shipped them to defendant at cost price in Michigan, each shipment being accompanied by a draft for the amount which defendant was to pay; and defendant was to sell the peaches and any profit was to be equally divided between the parties. In an action to recover the balance alleged to be due, held, that, whatever the legal effect of the agreement between the parties was, their dealings did not constitute a "doing of business" within this State, on the part of the plaintiff, within the mean-

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CORPORATIONS — Continued.
ing of section 15 of the General Corporation Law (L. 1890, ch. 563). In order to justify a dismissal of an action brought by a foreign corporation on the ground of failure to obtain a certificate under section 15 of the General Corporation Law, it must appear that the plaintiff is a foreign stock corporation. Brown Seed Co. v. Richardson, 517.

Actions against corporations — Parties in action against — Joint stockholders. Jones v. Suburban Home Co., 63.

See Parties.

COSTS.
Amount — Statutory allowances at various stages of proceedings — Proceedings before notice — On interlocutory judgment. — Upon an interlocutory judgment sustaining a demurrer to the complaint, the defendant is not entitled to tax costs before notice of trial. Penfield v. City of New York, 39.

Amount — Allowances on motions and interlocutory proceedings — Argument of demurrer; Payment and enforcement thereof — Staying further proceedings in actions till costs paid — Waiver of stay. — A defendant, by serving a notice of argument of an appeal from an order denying his motion to retax costs on an appeal, waives a stay because of plaintiff's non-payment of costs of a motion. Where, upon the affirmance of a judgment overruling defendant's demurrer, he is granted leave to withdraw it and plead over upon payment of costs "in this court and the court below", the clerk of the court below has no authority to refuse to tax the costs as directed by such order; and defendant, on an appeal from an order denying his motion for a retaxation of costs, may not object to the allowance of the costs upon the appeal because plaintiffs served no notice of argument and made no oral argument nor submitted a brief. Such objection should have been made to the appellate court on motion to resettle the order. Where, upon the entry of an interlocutory judgment overruling a demurrer, the defeated party is allowed to plead over on payment of costs, the successful party is entitled to tax costs after notice and before trial and a trial fee and disbursements, but not costs before notice of trial. Costs subsequently imposed upon a motion made for a reargument of the appeal are improperly taxed, as they form no part of the costs referred to in the order affirming the judgment. Costs which were or should have been taxed on the entry of the interlocutory judgment in the court below are not properly taxable under the order of the Appellate Term. An item of costs for service of the summons and complaint, being taxable upon entry of the final judgment, is not properly taxable under the order of the Appellate Term and should have been disallowed. Hill v. Muller, 262.

COURT OF GENERAL SESSIONS.
See Criminal Law.

CRIMINAL LAW.
1. *Preparation for and matters preliminary to trial—Right to inspect minutes of grand jury.* — A person indicted for a crime will be permitted in the Court of General Sessions to inspect the minutes of the grand jury when necessary to enable him to determine whether the indictment was found, indorsed and presented as prescribed by law, or whether a person was present during the session of the grand jury contrary to law, or whether the defendant's constitutional rights were invaded by the action of the grand jury in finding the indictment

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CRIMINAL LAW — Continued.
without evidence or upon illegal and incompetent testimony. People v. Klaw, 158.

2. *Criminal procedure — Proceedings on review — Right of review and procedure — Proceedings to obtain review: Service of affidavit, etc.*— Where no copy of the affidavit upon which an appeal from a conviction in a police court, together with notice that the appeal had been allowed, has been served upon the district attorney, as required by section 752 of the Code of Criminal Procedure, nor an undertaking given as required by section 754, nor the appeal brought to argument at the next term of the County Court, and no justification for continuing the case "by special order," as provided by section 760, exists, the appeal will be dismissed on motion of the district attorney. People v. Cimini, 525.

3. *Criminal procedure — Proceedings on review — Right of review and procedure — Proceedings to obtain review — Delivery of affidavit and allowance of appeal.*— Where the affidavit upon which an appeal from a conviction for intoxication in a public place was allowed was not delivered to the magistrate within five days, as required by section 755 of the Criminal Code, so that no return of the magistrate could be made, the appeal must be dismissed. People v. Versage, 528.

DAMAGES.
1. *Double and treble — When recoverable.*— Where the plaintiff seeks treble damages for a forcible entry under section 1669 of the Code of Civil Procedure, it should appear from the complaint that the action is brought to recover such damages; and, in such a case, where there is no allegation of such a claim in the complaint, a motion for treble damages will be denied, although the facts as found by the jury might authorize their recovery. Salmon v. Blasier Manufacturing Co., 36.

2. *Particular contracts and relations — Contracts relating to transfer or exchange of property — Agreement to take or deliver corporate stock.*— In an action for damages for failure to deliver a $5,000 share in a shooting club, where the election of the purchaser to membership in the club is a prerequisite to his enjoyment of its privileges or to any rights as a shareholder, the plaintiff is entitled to nominal damages only; and a verdict for $3,000 will be set aside, though it appears that a share has been sold for $5,000 and the club has lands for which it paid $100,000. McAlpin v. Garden, 401.

3. *Double and treble damages — Who to sue.*— The right of action given by sections 1667 and 1668 of the Code of Civil Procedure to recover treble damages against any person who cuts down or carries off any wood, underwood, tree, or timber, or girdles or otherwise despoils a tree on the land of another, without the owner's leave, is based upon the theory of an injury to the land owned by the person injured, and an action can be maintained only by the owner of the fee. Kellar v. Central Telephone & Telegraph Co., 523.

4. *Particular contracts and relations — Contracts with agents, brokers and factors.*— A recovery for breach of contract must be confined to the actual loss sustained; and, where defendant agreed to pay a broker for procuring a loan upon certain property, but refused to accept the loan, she may, in an action for breach of contract, prove that the broker had agreed to pay the lender one-half of his commission. Finck v. Pierce, 554.

See **Master and Servant.**

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DEFAULT.

Right to take default — In general — At trial term not until cause reached on calendar. — Where, upon the day set for the trial of a case in the City Court of the city of New York, the trial justice had before him an unfinished case and another case ready for trial, which was tried, and defendants' counsel was actually engaged in the trial of a case in the Supreme Court, an inquest was improperly ordered; the case should have been marked "Ready" and an inquest should not have been ordered until the case was actually reached for trial. Pierce, Butler & Pierce Mfg. Co. v. Klienfeld, 260.

See Municipal Courts.

DEMURRER.

See Pleading.

DEPOSITIONS.

1. *Depositions on commission — Order for commission — Open commission — When surrogate will vacate order granting.* — Where, in a proceeding for the probate of a will involving the interests of an infant contestant, an open commission has been granted upon the application of the proponent to take the testimony of a foreign witness and the special guardian applies for an allowance from the estate to defray his expenses in attending the execution of the commission or employing counsel to represent him and the proponent opposes such allowance, the court, being without power to order the allowance, will vacate the order for an open commission and make an order providing for a commission to take the testimony upon written interrogatories. Matter of Sentell, 165.

2. *Perpetuating testimony — Application — Sufficiency of affidavit.* — Where the affidavit, upon which an order to take the deposition of expected adverse parties was obtained, omits to state the street and number of the office or place of business of the expected adverse parties and that they are of full age and does not state that it is desired to perpetuate the testimony of the witnesses, nor show a necessity for perpetuating it, nor show that a cause of action exists in favor of the applicants, the order must be vacated. Matter of Cohen, 400.

3. *On commission — Application for commission — Who may make affidavit — Sufficiency of affidavit; Not refused by delay which has not prejudiced adversary.* — Where, upon a motion for a commission to examine a non-resident witness, the allegations of the moving affidavits concerning the residence of the witness and his absence from this State are upon information and belief, the sources of such information and the grounds of such belief must be stated, and the reasons given why the affidavit of a person having personal knowledge of the matter is not produced; and, if the affidavit was made by the attorney for the moving party, the reason must be given why such affidavit was not made by the party himself. Upon such motion, the affidavit of one who was given in two other affidavits, made on information and belief, as the source of such information, that he was acquainted with the non-resident witness; that said witness now resides in the city of Newark, in the State of New Jersey, and is now in said State and not within the State of New York, is sufficient; the exact place of his residence need not be stated. Where such motion is made before the cause appeared on the day calendar for trial and there is nothing to indicate that plaintiff has been prejudiced by the delay, the motion may be granted as against an objection of laches. Tirpak v. Hoe, 529.

See Discovery.

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DISCONTINUANCE.
Grounds and objections — Accrual of substantial right to defendant. **Block v. Ottenberg, 647.**

DISCOVERY.
1. ***Examination of party before trial — Right to remedy — Matters not preventing.*** It is not a sufficient ground for vacating an order to examine an adverse party before trial that such party is a resident of the county and intends to be present at the trial, nor that the applicant can procure the required information from other persons; nor is a denial by the party sought to be examined of knowledge of the facts a sufficient ground. Turck v. Chisholm, 110.

2. ***Examination of party before trial — Right to remedy — Examination of defendant — When not allowed.*** — An examination of defendant before trial and after issue joined should be limited to the purpose of proving the plaintiff's case as alleged in the complaint and will not be allowed where it is apparent that the only object is to obtain information concerning facts upon which the defense is based or merely for the purpose of enabling plaintiff to prepare for trial. Merrill & Baker v. Woolworth, 253.

3. *Inspection — Examination of party before trial — Right to remedy: Physical examination; Examination at instance of adverse party — When allowed in general.*— Upon an affidavit setting forth that defendants in an action for personal injuries are ignorant of the nature and extent of the injuries complained of, of the manner in which they were sustained, and of other material facts witnin the personal knowledge of plaintiff as to the manner in which the alleged injuries happened to him, an order for his oral examination as a party before trial may properly include a provision for his physical examination. Even if defendants might have procured the information asked for by a bill of particulars, they had a right to obtain it under an order for his examination as a party before trial. Where the requirements of sections 870, 873 of the Code of Civil Procedure and the General Rules of Practice have been complied with, a motion for an order for the examination of a party before trial must be granted unless made in bad faith. Under section 3189 of the Code of Civil Procedure, as amended in 1902, the Supreme Court has full power to review discretionary orders of the City Court of the city of New York. Tirpak v. Hoe, 532.

DIVORCE.
1. *Custody and support of children: Power of court — Exercise of discretion — Provision for future modification of judgment; Matters by which court will be controlled.*— Where the referee, in an action by a wife for an absolute divorce, reported in favor of granting the divorce but awarding the custody of the children to the guilty defendant; and it does not appear that the wishes of the children, who are boys from twelve to fifteen years of age, had been consulted, and the court is not satisfied that the evidence justified the conclusion of the referee that the plaintiff's conduct and character establish her unfitness for the training of her children, the report will be confirmed and a judgment of divorce will be granted but with leave to the plaintiff to apply, upon proper proof, for a modification of the judgment as far as relates to the custody of the children and the allowance for their support. Burritt v. Burritt, 24.

2. *Evidence — Quantity of proof and probative effect of evidence — Adultry — Co-existence of opportunity and inclination.*— Where, in an

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DIVORCE — Continued.
action for absolute divorce, the plaintiff relies upon circumstantial evidence and situations claimed to necessitate the conclusion of adulterous conduct upon the part of defendant, the court must inquire whether opportunity for and inclination toward wrongdoing have been sufficiently proved. The evidence as to inclination as well as opportunity must be such as to lead a reasonable man to conclude that the adulterous act has been committed; and mere opportunity, even though prolonged and inviting, cannot, in itself, be a sufficient basis upon which to predicate inclination toward wrongdoing. Hutchinson v. Hutchinson, 438.

DOUBLE AND TREBLE DAMAGES.
See **Damages.**

DRUGGIST.
See **Negligence.**

EASEMENTS.
Change of interest in estates — Right of purchaser of dominant estate; Extinguishment and revival — Extinguishment generally — Street between upland and wharfage.— Where, under a deed from the city of New York in 1847, the grantee of upland and bulkhead rights acquired, as appurtenant thereto, the wharfage rights immediately opposite the dominant tenement, and, upon a partition of the land in 1860 by the heirs of the grantee from the city, the deed of four lots to one of said heirs granted all the wharfage rights lying in front of the land conveyed to her, and the city in 1868 by a deed to the heirs of its grantee confirmed the deed of 1847, a specific devise of the four lots by the grantee of the deed in partition, by reference to their numbers in the partition map of 1860, embraces the wharfage and bulkhead rights opposite thereto although no specific reference thereto was made in the deed. A separation of riparian rights from the upland will not be permitted because of the existence of a public street or road between the outer edge of the upland and tide water. Ennis v. Grover, 66.

ELECTION.
Of remedies — Inconsistency of remedies — Different remedies where rule of inconsistency is not violated.— An allegation in the complaint, in an action against a landlord for damages caused by leaks in the roof of the demised premises, that defendant had expressly agreed to protect the plaintiff from such damages, does not constitute an election to sue upon contract; and a judgment merely dismissing said complaint is not a bar to an action in tort for damages caused by the same leakage. Pratt, Hurst & Co. v. Tailer, 82.

ELECTIONS.
1. *Of officers — Nominations, etc.— Committee — Democratic State committee may not expel its duly elected members.*— The State committee of the Democratic party, which has no constitution or by-laws but which controls the State convention of the party and the nominations for public officers made by it, is under existing law elected by delegates from the respective senatorial districts and no power resides anywhere to reject their choice. Therefore, the attempted expulsion by a majority of said committee of the representatives from Kings county will be enjoined. Cummings v. Bailey, 142.

2. *Of officers — Nominations and preparation of official ballot: Primary — Notice; Certificate — Sufficiency.*— A paper purporting to be a certificate of nomination for village officers, made by the Independence League at a primary, is not sufficient to warrant placing the

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ELECTIONS — Continued.
names of the candidates upon the official ballot, where it appears that no sufficient notice of the primary was given; that the only public notice given was not subscribed by any committee or officer of the Independence League and that the primary was not called by any such committee or officer. Matter of Freund, 354.

EMINENT DOMAIN.
1. *Condemnation proceedings — Petition — Amendment of petition — Terms.*— Where the petition of a railroad company in condemnation proceedings, in describing the strip of land to be taken adjoining its right of way, excepted so much of the premises described "as is included within the lines of the highway," because petitioner's attorney was misled by the official search into the belief that the defendants had no title to the highway, and the mistake is discovered before an award is made, the petition, under section 721 of the Code of Civil Procedure, made applicable to condemnation proceedings by section 3368 of said Code, may be amended so as to include in the description of the property to be taken the highway itself. But, where the railroad company, while an action is pending by the owners of the highway to restrain it from entering thereon, obtains an order permitting it to go into immediate possession upon depositing $5,000, which is done, the amendment will be granted on condition that the petitioner pay all taxable costs to date in said action and also all witnesses' fees paid and taxable on the part of the owners in the condemnation proceedings to the date of the order, together with an allowance to their attorney upon the motion to amend and as compensation for his appearance to date before the commissioners. Matter of Lake Shore & Michigan Southern R. R. Co., 340.

2. *Condemnation proceedings — Hearing by commissioners — Admissibility and rejection of evidence — Evidence given on former hearing; Measure of compensation — In general — Valuing lot with open exposure as inside lot.*— In a proceeding to acquire lands for streets in the city of New York, where the report of the original commissioners of estimate and apportionment was not confirmed and new commissioners were appointed who were directed to reconsider the previous report and the subject matter thereof and return it corrected and revised or to make a new report, it was error to reject portions of the testimony given before the first commissioners when offered by property owners. A lot having a space of twenty-five feet between it and the building on the adjoining property, giving it light and air on three sides, should not be treated as an ordinary inside lot, although the city owned the adjoining property and might build upon it. Matter of Amsterdam Avenue, 342.

ESTOPPEL.
Equitable estoppel and estoppel *in pais* — Operation and effect — Public and individual acts and rights. McCoy v. McClarty, 69.
See Towns.

EVIDENCE.
1. *Opinion — Non-expert evidence — Distinction between matters of fact and conclusions of law — Ownership.*— The ownership of property is always a question of fact; and it was error to refuse to permit the purchaser at the execution sale to testify to whom the property belonged at the time of the subsequent levy. Lipschitz v. Halperin, 280.

2. *Judicial notice — Matters relating to municipalties — Direction and location of streets; Weight and sufficiency — Uncontradicted testi-*

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EVIDENCE — Continued.
mony.— The Municipal Court of the city of New York may take judicial notice of the direction and location of the streets and avenues in the city of New York. Where the only testimony in support of plaintiff's case is that of the plaintiff himself, and he makes contradictory statements and his testimony contains evidence of inherent improbability and two years elapsed, after the cause of action is claimed to have accrued, before the action was brought, these facts taken together are sufficient to justify the trial court in refusing to credit the plaintiff's testimony, though uncontradicted, and a judgment rendered in favor of the defendant will be affirmed. Gruber v. New York City R. Co., 322.

3. *Weight and sufficiency — Preponderance.*— In a civil action to recover a penalty the plaintiff rests under the burden of proving his case by a preponderance of evidence only, and not beyond a reasonable doubt. Kerin v. New York City R. Co., 568.

4. *Best and secondary evidence — When secondary evidence is admissible — Sufficiency of secondary evidence — Copies of instruments.*— In an action brought by an insurance company to recover premiums claimed to be due to it under the terms of its policies, where the original policies had been destroyed and it appeared that it was the custom of the company to issue policies according to the applications therefor and that the original applications for the policies in question were at the plaintiff's home office in Hartford, copies of such policies, offered by the plaintiff without any evidence that they conformed to the applications, were not competent evidence in support of the plaintiff's cause of action; and judgment of dismissal should have been rendered, without prejudice to a new action, but not judgment absolute in favor of the defendant. Aetna Life Ins. Co. v. Duparquet, Huot & Moneuse Co., 581.

5. *Documentary evidence — In general — Proof of private instruments.*— A lease for a term of less than three years is not a "conveyance" within the meaning of section 935 of the Code of Civil Procedure making a conveyance, acknowledged or proved and certified in the manner prescribed by law to entitle it to be recorded in the county where it is offered, evidence without further proof thereof. Goodman v. Greenberg, 583.

6. *Admissions — Admissibility as affected by subject-matter of admission — In general — Time of making.*— In an action by the payee against the maker of a promissory note given in part payment of the purchase price of a certain machine sold under a contract providing for the return of the purchase price upon the happening of either of two events, it is error to exclude evidence of plaintiff's admissions as to the machine and the terms of sale material to the defense because they were made after the maturity of the note. Theophine v. Vlachos, 612.

Judicial notice — Ordinances. Sachs v. Lyons, 640.

See Damages; Divorce; Gifts; Master and Servant; Negotiable Instruments; New Trial; Pleading; Vendor and Purchaser; Wills.

EXECUTION.
Against property — Sale — Property or title acquired by purchaser — Bona fide purchaser.— The title of a purchaser of goods under an execution sale at public auction, he being the highest bidder and paying an adequate price, cannot be affected because the judgment was collusive between the parties to the action and given to hinder, cheat and defraud the creditors of the judgment debtor. Lipschitz v. Halperin, 280.

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EXECUTORS AND ADMINISTRATORS.

1. *Collection of assets — Discovery and surrender of assets — Procedure — Dismissal.*— The surrogate may examine a person who is alleged to have in her possession property belonging to the estate of a deceased person notwithstanding the person sought to be examined claims, in a verified answer to the petition, the ownership of the property involved in the application. Matter of Packard, 163.

2. *Compensation — Particular services, etc. — Services additional to duty as representative — Carrying on business.*— Where a testatrix provides for continuing her business, an arrangement between her executrix and executor by which the latter should continue to manage the business as he had done in the lifetime of the testatrix and be paid the same compensation therefor, under which arrangement he continued to manage the business with skill and to the advantage of the estate, will be upheld. Matter of Kempf, 200.

3. *Rights and liabilities between representative and estate — Items charged or credited — Expenditures requested by next of kin or legatees.* — Where all persons having vested interests sign a paper in the nature of a protection to executors for the payment of certain claims and release the executors from any responsibility therefor, they may not afterward question the propriety of such payments; and, where there is nothing to show that the claims were not just and proper, their propriety will not be questioned by the surrogate upon the settlement of the executors' accounts because, under the provisions of the will, some other persons may become entitled to a contingent remainder. Matter of Robinson, 205.

4. *Rights and liabilities between representative and estate — Allowances — Counsel fees; Compensation — Particular services, etc.— Services additional to duty as representative — Services as attorney, etc.* — An executor will not be allowed extra compensation for his services in serving citations in the proceeding for the probate of the will; and where, being a lawyer, he attends to all the business of conducting such proceeding an allowance will not be made to his brother in law, also a lawyer, for such services where the latter went to the surrogate's office at the executor's request and "simply staid until it was over" the executor thinking there might be some opposition; and where in the defense of a small claim the executor incurred unnecessary and unreasonable expense, his allowance therefor will be limited to the amount of taxable costs and disbursements. Matter of Wick, 211.

5. *Articles set apart and sustenance for survivor and children — Money in lieu of articles specified in subdivisions 3 and 4 of section 2713 of the Code of Civil Procedure, when not allowed.*— Where payments to a widow of $400, for mourning apparel and sustenance, and $150, under subdivision 5 of section 2713 of the Code of Civil Procedure, have been credited to the executor in his accounts, the payment of $300 to her in lieu of articles specified in subdivisions 3 and 4 of said section will be disallowed. Where articles of copartnership provide that the firm shall continue for sixty days after the death of any partner and a partner who contributed no capital to the firm and had no capital account on its books but was allowed interest on his seat in a stock exchange, died, profits of the firm during such period of sixty days after his death are income and not principal and pass to his widow as the life beneficiary of his residuary estate. Matter of Weaver, 244.

6. *Accounting and settlements — Contests — Objections and hearing and settlement thereof — Presumptions and inferences — Effect of*

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EXECUTORS AND ADMINISTRATORS — Continued.
vouchers.— The burden of showing the impropriety of a payment to counsel for services rendered to the deceased during her lifetime is upon the contestant; and a mere objection to such payment will be overruled where there is nothing upon the face of the bill which is improper. Matter of Dittrich, 511.

See Wills.

FORECLOSURE.
Of mortgages on land — Foreclosure by action and sale — Sale: Notice — Sufficiency of publication; Setting aside sale — Inadequacy of price.— Where, on foreclosure sale, the premises are purchased by the plaintiff in the action, the only bidder, for $11,035.19, and, upon a motion to confirm the referee's report of sale, the plaintiff's affidavits tend to show that the purchase price was reasonable, and no infants' interests are involved, the affidavits of six persons, read in opposition, stating that in their opinion the market value of the premises was from $12,000 to $14,000, are insufficient to justify setting aside the sale for inadequacy in the purchase price. Where the sale took place on Tuesday, January 8, 1907, a notice of sale published twice in each week for three successive weeks immediately preceding the day of sale, the first publication being Tuesday, December 18, 1906, is sufficient; and a contention that both the first and last days of publication should be excluded is erroneous. Cortland Savings Bank v. Lighthall, 423.

Of mortgages on land — By action and sale — Right to foreclose — Acquisition of mortgagor's title except right of redemption. Chumar v. Melvin, 460.

See Landlord and Tenant; Mechanics' Liens; Mortgages.

FORMER ADJUDICATION.
1. *Causes of action barred or merged in general — Causes of action on indebtedness and on collateral security.*— Where the captain of a vessel, for the purpose of paying ship brokers the expenses for port charges, supplies and services, drew to his own order and indorsed a note payable five days after the arrival of the vessel at the port of destination, and the brokers delivered the same to plaintiff who advanced the amount thereof which was applied to the payment of such expenses, the receipts for which were sent to the owners of the vessel; in an action thereafter brought against the owners to recover the moneys advanced by the plaintiffs, a judgment of the Commercial Court of Antwerp, in favor of the defendants, in an action upon the note, brought by plaintiffs against the captain of the vessel in his representative capacity and the defendants in the present action, upon the ground that the master had no authority to make the note, is not an adjudication upon the question of the defendants' liability in the present action. Commercial National Bank v. Sloman, 97.

2. *Who are concluded — Persons acting in particular capacity.*— Where a testamentary trustee brings an action in the Supreme Court in the interest of the estate and judgment is obtained by the defendant because, as to an alleged statement of an account, he is believed against the plaintiff, the judgment is not binding as an estoppel against the trustee on an issue as to his good faith in his dealings as trustee upon the judicial settlement of his accounts as trustee. Matter of Gillroy, 243.

3. *What matters are concluded — Matters not in issue — Subsequently acquired interest or title.*— Where two successive assignments are made of the interest of the assignor in the estate of a deceased person and

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FORMER ADJUDICATION — Continued.
the junior assignee recovers a judgment establishing the invalidity of the prior assignment for fraud and misrepresentation and the senior assignee thereafter obtains from the assignee another assignment and brings suit against the junior assignee to set aside her assignment for fraud and misrepresentation, the former judgment, not being an adjudication of the validity of the junior assignment as against the assignor, does not conclude the senior assignee when claiming under his later assignment. Carmer v. Still, 443.

What matters are concluded — In general — Matters actually determined. Matter of Oltmans, 208.

Who are concluded — Principal and surety. Coe v. Patterson, 412.

FRAUDULENT CONVEYANCES.
Remedies of creditors and practice relating to attacks upon conveyances — Evidence — Weight and sufficiency of evidence.— Where such property is again attached as the property of said judgment debtor and, upon said purchaser giving a bond under section 85 of the Municipal Court Act, is delivered to him by the marshal; and where, in an action brought upon the bond, it appears that, after the auction sale, the goods were placed in the possession of the judgment debtor with permission to sell them; that he was present when the attachment was levied; that his father-in-law's name was on the door of the room where the goods were when seized; that the name of the purchaser at the execution sale, who was the brother-in-law of the judgment debtor, was not on the door, and that said purchaser was not engaged in the business for which the goods levied upon were used, such facts have no bearing upon the *bona fides* of the purchaser at the execution sale and are not evidence of a subsequent transfer of the property from the purchaser to the judgment debtor. It was incumbent upon the plaintiff, in the action upon the bond, to show that the purchaser had divested himself of his title by evidence of facts or circumstances from which it might fairly be inferred that such transfer was made. Lipschitz v. Halperl

GIFTS.
1. *In general — Particular instances — Funds in bank; Delivery and acceptance — Evidence.*— A mother, about a year after her account in savings bank standing in the name of her son, as her trustee, had been changed to him as an individual, executed, in the presence of two subscribing witnesses and with full knowledge of its contents, a writing containing a positive declaration that, of her own free will and without influence exercised upon her, she had given the money in the savings bank to her son and delivered it to him and put him in the absolute possession and ownership thereof and which paper further ratified and confirmed said gift to the son and declared that it was made with full understanding of its effect and that said gift was made as a simple act of justice to her son and that he had become the absolute owner of said money. By her instructions this paper was delivered to the son. Held, that the evidence showed a valid gift *inter vivos*. The mother by her will and codicil thereto, executed respectively one and two years after said declaratory paper and subsequently admitted to probate, declared that said money in the savings bank was at the time of the execution of the will held by the son in trust for her and was specifically bequeathed to legatees named. In an action by her executor against the son for an accounting and to set aside the declaratory paper and to recover the amount of the bank deposit with interest, held, that the said declaratory paper would

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GIFTS — Continued.
have been conclusive upon the testatrix until attacked and explained away; and, there being no sufficient evidence against its validity in this action, defendant was entitled to judgment dismissing the complaint. Gick v. Stumpf, 83.

2. *In general — Particular instance — Bank deposits in joint names of donor and donee.*— A widow, having considerable means, whose children were grown up and had families, was afflicted with a cancer. Having savings bank accounts in her own name she subsequently had them opened in the joint names of herself and her unmarried sister who lived with her, cared for her and attended to the household matters. The sister, who was also the executrix, and took under the will of the widow all her jewelry and ornaments, a dwelling, having an equity of over $4,000 and over $9,500 in mortgages, put in a claim of $6,500 for care of the deceased, which she afterward withdrew because, as she said, "there has been too much talk about it", and also claimed the savings bank deposits. Her testimony that the deceased made a gift of the deposits to her was uncorroborated; and the bank officials, in whose presence the alleged transactions occurred, declared that they would open an account in the joint names where the parties said they desired to have it done for the sake of convenience. Held, that no gift had been established, and that the two bank deposits should be regarded as the property of the estate. Matter of Dittrich, 511.

See Wills.

GUARDIAN AND WARD.
See Guardians.

GUARDIANS.
Accounting and settlement — In general — Settlement between guardian and ward — When not to be inferred; Rights and liabilities on guardianship bonds and actions thereon; Defenses; Evidence.— In an action against a guardian and her sureties upon her bond to recover money alleged to have been lost through improper investments it is no defense to the sureties that they were induced to sign the bond by the false and fraudulent representation of the guardian as to the investment of the ward's money, made at or prior to the execution of the bond. The return unsatisfied of an execution, issued upon the surrogate's decree entered upon the judicial settlement of the guardian's account, justifies an action against the guardian's sureties and is sufficient proof that the plaintiff, the late ward, has exhausted his remedy against the guardian. A deed of conveyance from the guardian to her late ward is not presumptive evidence of a settlement of all matters between them and may not, by inference, be extended to matters not specifically mentioned or referred to therein. Rouse v. Whitney, 56.

HEIRS, DEVISEES AND LEGATEES.
Mutual rights and liabilities — Election — Between testamentary provision and individual estate. Matter of Pearce, 216.

See Wills.

HIGHWAYS.
Road officers — Highway commissioners — Reimbursement for necessary expenses. McCoy v. McClarty, 69.

See Towns; Trespass.

INFANTS.
Property and conveyances — Sale, mortgage or lease under order of the court — Title and rights of purchaser, etc. Fellen v. Mitchell, 486.

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INJUNCTION.

1. *Who and what may be enjoined — Interference with property rights by private persons — Possession and use of premises.*— Where a tenant had occupied premises for business purposes for nearly ten years, under a lease containing a covenant for an extension of five years more, had expended a large sum in fitting up the premises for his business and had built up a valuable business there and, being unexpectedly in a foreign country on the day when the terms of the lease required notice of his intention to renew to be given, gave notice eighteen days later, the day after his return to this country, the landlord having suffered no injury from the delay, held, that equity would relieve the tenant from the consequences of his omission to give notice on the day named in the lease and, in a suit to restrain the landlord from interfering with his property, that an injunction *pendente lite* should be granted. Doepfner v. Bowers, 7.

2. *Preliminary injunction — Papers on motion for injunction — Sufficiency of affidavit without complaint.*— Although the failure of the affidavit upon which a preliminary injunction was granted to state whether any previous application has been made for the order asked and the failure of the injunction to state the grounds upon which it was granted are mere irregularities which the court might disregard, the fact that the affidavit was not made by the plaintiff and that no excuse for his failure to make the same was shown, in connection with the fact that the affidavit is largely the conclusions of the attorney who made it and not statements of his personal knowledge nor of the sources of his information, and the injunction was not founded upon the summons and complaint, it should be vacated upon defendant's motion. Terry v. Green, 10.

3. *Preliminary injunction — Grounds and matters considered — When granted in general — Use of demised premises.*— Though the cutting of an arched opening through the wall of the building upon demised premises was unjustifiable and constituted waste, a temporary injunction will not be granted to restrain the tenant's use of the opening as a passageway after its completion, in the absence of proof of special damage and where such use is not in violation of the terms of the lease. Chamberlain v. Childs' Unique Dairy Co., 371.

4. *Who and what may be enjoined — Breach of contract — Contracts for use of copyright, etc.— Unauthorized changes in text.*— One who undertakes to produce a play written by another, under an agreement providing that no changes or alterations in the play or additions thereto shall be made without the consent of the author, will be restrained by injunction from making unauthorized changes and modifications in the text and structural arrangement thereof. Royle v. Dillingham, 383.

5. *Preliminary — Grounds and matters considered — When right depends on extrinsic facts — Acts tending to render judgment ineffectual.*— In such a case, where the whole capital stock has been issued to the defendant with whom the arrangement with the plaintiff was made and it appears that the defendant is of doubtful responsibility, an injunction will be granted restraining him from disposing of any of the stock during the pendency of the action. Rau v. Seidenberg, 386.

Actions for — Parties — Defendants. Jones v. Nassau Suburban Home Co., 63.

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INJUNCTION — Continued.
Preliminary injunction — Grounds and matters considered — Injunction when right depends on extrinsic facts — Acts tending to render judgment ineffectual. Lozier Motor Co. v. Ball, 375.

Who and what may be enjoined — Enjoining fire commissioners. Ultecht v. Allen, 390.

Preliminary injunction — Grounds and matters considered — Grounds for refusing — Failure of complaint to state cause of action — Nonperformance of conditions by plaintiff. South Shore Traction Co. v. Town of Brookhaven, 392.

See Municipal Corporations; Parties.

INSPECTION.
See Discovery.

INSURANCE COMPANIES.
Organization and conduct of business — Reorganization — Effect upon original company — Authority of former officers continues. Matter of Empire State Supreme Lodge, 344.

See Corporations.

JOINDER.
See Parties.

JOINT DEBTORS.
Joint agreements and liabilities — On contracts — Under joint debtor acts — Compromise by joint debtors.— Under the provisions of section 1942 of the Code of Civil Procedure, the mere payment by one partner of his part of the liability upon notes of the firm does not discharge the other partner from his share of the indebtedness. Where, in actions brought by the payee of promissory notes against the makers who signed as partners, defendants answer separately, both pleading a general denial and the Statute of Limitations, and one adds a plea of release and payment and offers in evidence the receipt for his part of the indebtedness on the notes, but the evidence is conflicting as to whether in fact any money was paid when the receipt was given, and the trial justice instructs the jury, in substance, that, if they believe the plaintiff received the money called for by the receipt, their verdict should be for that defendant, and the jury find in favor of the plaintiff for the face of each note, less the amount receipted for and a partial payment made by the other defendant, he is not entitled to have the verdict set aside because it was contrary to the instruction of the court. Kaplan v. Shapiro, 606.

JUDGMENT.
Rendition — At particular stages of the action — Judgment on demurrer — Interlocutory and final judgment; Entry — What constitutes.— Final judgment should not be entered after the trial of the issues of law arising upon a demurrer to a counterclaim where issues of fact remain to be tried. Filing with the clerk an order sustaining a demurrer to a counterclaim signed by the judge without the order being signed by the clerk does not constitute an entry thereof, nor is the order an interlocutory judgment; and final judgment entered pursuant thereto will be vacated. Selley v. Irish Industrial Exposition & Amusement Co., 46.

Rendition — At particular stages of the action — Judgment on dismissal. Aetna Life Ins. Co. v. Duparquet, Huot & Moneuse Co., 581.

See Costs.

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JURISDICTION.
See Municipal Courts.

JUSTICES OF THE PEACE.
Appeal and error — Review — Questions considered — Relief from default — Manifest injustice — Code of Civil Procedure, § 3064.— Where, upon appeal from a justice's judgment taken upon defendant's failure to appear, the affidavit of his attorney shows that defendant gave him the summons served with directions to put in an answer; that defendant stated the supposed case to the attorney who advised him that, if it was the same, defendant had a good and valid defense; that the attorney had other engagements which so occupied his time that he forgot, and the direction of the defendant was not carried out; that the attorney omitted to make entry in his journal on his return to his office, all of which was on account of pressure of matters of business; and, by way of excusing delay in bringing the appeal to argument, the attorney states, in another affidavit, that he has been endeavoring to settle the differences between the parties, both of them having been his clients, and that the plaintiff had expressed a desire that that be done; and the defendant also swears, in an affidavit supplementing the statements of his attorney, that he is not indebted to the plaintiff, and never was, for the alleged cause of action upon which the judgment was rendered, the judgment must be affirmed upon the ground that the defendant has neither made "a satisfactory excuse for his default" nor established that "manifest injustice has been done" within the meaning of section 3064 of the Code of Civil Procedure. Coleman v. Keady, 520.

LANDLORD AND TENANT.
1. *Extensions, renewals, etc.— Option to renew — Notice of intention.*— Equity will relieve a tenant from the consequences of his failure to comply with a condition requiring notice in a covenant for the renewal of his lease where it appears he has given a fair intimation of his intention to renew and no injury has been done to the other party. Doepfner v. Bowers, 7.

2. *Landlord's title and reversion — Rights and powers of landlord — Assignment and rights of assignee.*— Where a landlord who is the owner of the demised premises assigns the lease, together with his right to the control, occupancy and possession of the premises for a period of more than four years beyond the expiration of the term, and the tenant holds over, the assignee of the landlord occupies the relation of landlord to the tenant and may elect to treat the holding over as a tenancy for another year. United Merchants' Realty & Improvement Co. v. Roth, 92.

3. *Termination of relation — Notice — Necessity — Sufficiency.*—Under a lease for five years, terminable by either party at the expiration of one year on sixty days' notice in writing, such notice must be given within sixty days of the expiration of the first year. Fine Realty Co. v. City of New York, 246.

4. *Re-entry and recovery of possession by landlord — Summary proceedings — Redemption.*— Where a tenant mortgages his estate and is thereafter dispossessed for non-payment of rent, the unexpired term of his lease exceeding five years when the warrant is issued, and the mortgagee thereupon takes a new lease from the landlord for the whole of the unexpired term, she may nevertheless maintain an action to foreclose her mortgage; for the right of redemption given by section 2256 of the Code of Civil Procedure is outstanding and is not merged in the plaintiff's term. Chumar v. Melvin, 460.

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LANDLORD AND TENANT — Continued.
Rights, duties and liabilities in regard to the premises — Injuries from defective condition — Actions for injuries from negligence. Pratt, Hurst & Co. v. Tailer, 82.

Rent and advances — Rights and liabilities — Eviction — Liability of assignee thereafter. Fechter v. Schonger, 648.

See Election; Injunction.

LEASE.
See Landlord and Tenant.

LIBEL.
Slander — Pleading — Complaint — Colloquium — In suit by copartnership, allegation that article was published concerning the individual plaintiffs suffices.— A partnership unlike a corporation has no legal existence apart from the members composing it; and, in an action by the copartners for libel, it is sufficient to allege and prove that the article complained of was published concerning the individual plaintiffs. Bergstrom v. Ridgway-Thayer Co., 95.

LIENS.
See Attorneys.

LIFE ESTATES.
Rights of life tenants as distinguished from those of remaindermen — Stock dividends representing accumulated earnings. Matter of Harteau, 201.

LIQUOR TAX LAW.
Intoxicating liquors — Revocation or forfeiture of license — Grounds of forfeiting license — False statements in application — When deemed material.— Where an applicant for a liquor tax certificate states in the application that traffic in liquor was not actually lawfully carried on in the premises on March 23, 1896, and further states that there were only two buildings occupied exclusively as dwellings within two hundred feet of the premises, when, in fact, there were four to his knowledge, the certificate must be canceled, and such cancellation cannot be avoided by showing that the first statement was untrue; that traffic in liquors was actually lawfully carried on in said premises on the date mentioned and the statement as to dwellings within the prescribed distance of the premises was, therefore, immaterial. Matter of Clement, 358.

LIS PENDENS.
Commencement and pendency of action and notice — Cancellation of notice — Grounds.— Where the complaint, in an action to recover a deposit made by a vendee on a contract to purchase real estate together with expenses of searching title, alleges no facts showing plaintiff's right to resort to equity or that he has not a full and adequate remedy at law, a *lis pendens* filed in the action will be canceled on motion. Krainin v. Coffey, 6.

MANDAMUS.
Against judicial officers — Grounds and defenses — Existence of remedy by appeal.— Where a justice of the Municipal Court of the city of New York, after issue joined and several adjournments of the trial, ordered the transfer of an action from the district over

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MANDAMUS — Continued.
which he presided and in which neither of the parties resided to another district in which the defendant's office for the transaction of its business was situated, his action may be reviewed upon appeal from the final judgment in the action; and a mandamus will not be granted to compel the justice to retain jurisdiction and try the action. People ex rel. McGowan v. Murray, 364.

MASTER AND SERVANT.

1. *Master's liability for injuries to servant — Fellow servants — Difference in character of work — Draftsman and elevator man.*—Where plaintiff, a draftsman employed by a railroad company in its surveying and engineering department, is injured while stepping off the elevator in a building occupied by it and another railroad company for depot and office purposes, the elevator being used by the employees of both companies and the general public; and where there is no evidence as to the circumstances attending the injury other than that the door on the landing closed partly to, striking plaintiff as he was stepping from the elevator, and that the elevator began to descend, throwing him to the floor and causing the injuries complained of; and where there is nothing to indicate or suggest that the movement of the door and the descent of the elevator might not have been due to the negligent act of the elevator man, and there is no fact or circumstance shown wherefrom the negligence of the master may be inferred, or to justify an inference that the elevator or the machinery and apparatus used in its operation were defective or out of repair, the plaintiff may not recover against his employer. In such case the rule as to the master's non-liability to an employee for the negligence of a co-servant applies; and the maxim *res ipsa loquitur* does not apply. Fouquet v. New York Central & Hudson River R. R. Co., 121.

2. *The relation — Actions for wrongful discharge — Presumptions and burden of proof — Seeking other employment.*— In an action to recover damages for the breach of a contract of employment, the plaintiff is not required to show affirmatively, as part of his case, that he sought other employment but could not find it; that he found other employment elsewhere, or refused similar employment when offered, or that he might have found such employment, is matter of defense. Graff v. Blumberg, 296.

3. *The relation — Actions for wrongful discharge — Pleading.*— In an action to recover damages for the breach of a contract of employment, an allegation in the complaint that defendants broke said agreement "by attempting to terminate said agreement and discharge said L. and refusing to allow said L. to longer continue to perform his services under the said agreement, and instructed said L. to return the samples of goods of defendants which he was using to solicit orders, and in other respects prevented the said L. from soliciting orders from his customers throughout the State of New York" is a sufficient allegation of the breach of the contract by defendants; and it was error to dismiss the complaint for failure to state facts sufficient to constitute a cause of action, on account of the supposed insufficiency of such allegation. Abrahams v. Finkelstein, 314.

4. *Master's liability for injuries to servant — Actions — Weight and sufficiency of evidence — Negligence on part of master.*— In an action to recover for personal injuries sustained by the falling of defendants' elevator operated by their servants, where it appears that the elevator fell with a crash and plaintiff was pulled out between two floors crying and hurt, there is evidence of negligence sufficient to

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MASTER AND SERVANT — Continued.
submit to the jury and it is error to dismiss the complaint. Glassman v. Surpless, 586.

Liability for injuries to third persons — Liability of master for acts of assistant employed by servant. Bamberg v. International R. Co., 404.

Master's liability for injury to servant — Risks assumed by servant — Negligence of fellow servants — Master's assurance of safety. Graham v. Van Hauten, 641.

MECHANICS' LIENS.

1. *Bond or deposit to avoid lien — Fixing liability of sureties — No lien, no liability.*— Upon an undertaking given to discharge a mechanic's lien under the provisions of section 20 of the Lien Law (L. 1897, ch. 418) and conditioned for the payment of "any judgment which may be recovered in an action to enforce the lien," the sureties are not liable unless the judgment establishes the validity of the line. Casey v. Connors Brothers Construction Co., 101.

2. *Consent of owner — Persons who are owners.*— Where the owner of land contracted to sell it and the purchaser proceeded to erect a building upon it but failed and did not carry out his contract and, thereafter, one who had furnished labor and materials for the building and who might file a lien therefor refrained from so doing at the request of the owner and upon the owner's promise to pay him, his action in refraining from filing a lien was a good consideration for the promise of the owner to pay his claim, which was an original promise and not a promise to pay the debt of another within the meaning of the Statute of Frauds. In such a case the consent of the vendor is sufficient to authorize one furnishing labor and materials to file a lien against the property when the purchaser has failed to carry out his contract. Schnaufer v. Ahr, 299.

3. *Notice of lien — Sufficiency: Description of premises; Amount earned and unpaid on contract.*— Where a notice of lien states the contract price, the payments already made, the sum "now earned and unpaid" and the additional amount "which will be due and owing to the claimant when the contract is completed," in such manner that by a process of addition the total amount due and owing may be ascertained; and where the notice also states in one place that the lien is claimed upon a stable standing upon lots designated by certain numbers on Perry street, in the borough of Manhattan, and in another place upon lots designated by the same numbers on Ferry street, in the same borough; the notice sufficiently complies with the requirements of the statute to create a lien for the amount thus ascertained upon the premises designated by the given numbers on Perry street in said borough. Hurley v. Tucker, 464.

4. *Rights of subcontractors — Counterclaims.*— Laborers and materialmen who perform labor and furnish materials to a subcontractor to enable him to perform his contract and who acquire a lien therefor upon the unpaid balance of the contract price for a public improvement are entitled to payment therefrom without regord to the existence of a counterclaim or offset in favor of the principal contractor against the subcontractor arising out of antecedent transactions between them. Falvello v. City of New York, 468.

MORTGAGE TAX LAW.
See Taxes.

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MORTGAGES.
Transfer of title of mortgagor — Purchase by mortgagee — Merger. Chumar v. Melvin, 460.

See Foreclosure; Landlord and Tenant.

MOTIONS AND ORDERS.
1. *Obtaining testimony to be used on motion — In general — Not ordered when useless.*— Where, in an action to rescind a contract for the purchase of defendant's land and to recover moneys deposited, the court finds that defendant had falsely represented that the land was firm, natural ground suitable to support buildings, a referee to take depositions for use upon a motion for a new trial will not be appointed where it clearly and positively appears that the persons to be examined will not swear to the facts which defendant seeks to establish. Where one of the persons whose depositions are sought not only refused to verify a proposed affidavit upon the ground that he had no knowledge of the matters therein contained but also refused to make any affidavit whatever upon the application, the motion as to him will be granted. Davis v. Rosenzweig Realty Operating Co., 1.

2. *Orders — Settling order — Destroying one of two different orders inadvertently signed but not entered and adopting the other.*— Where upon the affirmance of an interlocutory judgment overruling a demurrer, the plaintiffs enter a final judgment in the action, and, upon the granting of defendant's motion to vacate the same, both parties hand up proposed orders for signature and the judge inadvertently signs both and they are filed in the clerk's office without having been entered, and, thereafter, the justice, after examining both orders in the presence of plaintiffs' attorney and a representative of defendant's attorney, destroys defendant's order, a denial of defendant's motion to have filed and entered a copy of the destroyed order with the same legal effect as the original order is proper and the order entered thereon affecting no substantial right is not appealable. Defendant could have made a motion to resettle the plaintiffs' order and if, by a denial of such motion, he was injured in a substantial right, he could have appealed from the order entered thereon. Hill v. Muller, 255.

MUNICIPAL CORPORATIONS.
1. *Officers and agents — Officers and employees or agents other than mayor and common council — Resignation, removal, etc.— Investigation of charges and proceedings to remove — Review on certiorari.*— A veteran employee of the Tenement House Department of the city of New York against whom charges have been preferred, triable before the commissioner and deputy commissioner of the department, has a remedy by certiorari to review the proceedings in case they result in his removal or attempted removal; and a writ of prohibition will not be granted to prevent the officers having jurisdiction from trying the charges. People ex rel. Crowley v. Butler, 366.

2. *Fire department — Power of fire commissioners — Disbanding and reinstating companies.*— The action of the board of fire commissioners of the city of Mount Vernon in disbanding a fire company upon charges preferred by the chief, without notice or hearing, though within the power of the board, is not judicial in its character; and the court will not enjoin the same board, though composed of different members, from later revoking the order disbanding the company and from reinstating it. Ultecht v. Allen, 390.

3. *Remedies of taxpayers and corporators — Right of taxpayer to interfere in corporate management — Only in case of lack of power or fraud.*— A taxpayer's action, brought under L. 1881, ch. 531, as

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MUNICIPAL CORPORATIONS — Continued.
amended in 1892, to restrain and obtain redress for unlawful official acts of public officers is only authorized where the acts complained of are without power or where corruption, fraud or bad faith amounting to fraud is charged. A board of town highway commissioners, about to grant a franchise to conduct a public lighting service, in an honest exercise of discretion after a public hearing has been given to taxpayers and citizens, may refuse to accept money for such franchise and grant it to a corporation without receiving compensation; and their action is not reviewable by the courts. Where the complaint in such an action against said board does not allege and the proof does not show fraud or corruption or acts of bad faith amounting to fraud in granting the franchise, though it appears that, at the meeting at which the board were about to grant the franchise, an individual offered to pay $1,000 for it and tendered the money, the complaint will be dismissed at the trial, but without costs. Craft v. Lent, 481.

Remedies of taxpayers and corporators — Action by taxpayer — To prevent payment of illegal claim. McCoy v. McClarty, 69.

See Towns.

MUNICIPAL COURT OF NEW YORK.
See Evidence; Municipal Courts.

MUNICIPAL COURTS.
1. *Procedure — Vacation of judgment — Opening default.* — Where a case is ready upon the calendar and defendant's request for an adjournment is refused, and he suffers an inquest to be taken without further appearance, a judgment thus rendered is upon his default; and a motion to open the same, based upon an affidavit of merits and affidavits showing sufficient grounds, should be granted. A denial of the motion, not upon the merits but for want of power, is erroneous. Guggolz v. Arch Realty & Construction Co., 258.

2. *Procedure — Vacation of judgment; Review — Judgments and orders reviewable — Order opening default not reviewable.* — The Municipal Court of the city of New York is not authorized to vacate and set aside a judgment rendered by it unless its order directs a new trial. Where a second judgment by default, rendered in the Municipal Court of the city of New York, is vacated on defendant's motion and the case set down for trial and defendant appears specially and moves to dismiss the complaint and judgment is again taken upon his default, his appeal from the last judgment and from that portion of the order vacating the second judgment which set the cause down for trial must be dismissed. Dixon v. Carrucci, 271.

3. *Procedure — Attachment — Application of §§ 1421–1425 of Code of Civil Procedure.* — The provisions of the Code of Civil Procedure (§§ 1421–1425), relating to actions against public officers to recover a chattel levied upon or damages resulting from levies or sales, do not apply to such a case. Krauss v. Merklee, 277.

4. *Jurisdiction — Municipal Court of the city of New York — Action against carrier.* — The Municipal Court of the city of New York has jurisdiction of an action against a carrier for the breach of its agreement to carry safely, though such breach be accompanied by acts of the carrier's servants amounting to an assault upon the plaintiff. Schwartz v. Interborough Rapid Transit Co., 289.

5. *Procedure — Transfer to another court or district.* — In an action in the Municipal Court of the city of New York the trial judge has

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MUNICIPAL COURTS — Continued.
no authority to interrupt the trial, which is being had in the proper district, and take the case to another district for the completion of the trial; and by so doing he loses jurisdiction of the case. Federal Sign System Electric v. Bloyen, 294.

6. *Procedure — Relief from default.*— Where the summons in a Municipal Court action was duly served and filed and the case placed on the day calendar and the plaintiff failed to appear on the call of the calendar, the court may, under section 253 of the Municipal Court Act (L. 1902, ch. 580), open plaintiff's default. Wolfert v. New York City R. Co., 536.

7. *Procedure: Adjournment; Relief from default — Terms of opening default.*— Upon the presentation, at the call of a case in the Municipal Court, of an affidavit by defendant's attorney that he is then actually engaged in the Supreme Court, Kings county, in a named case the trial of which would take all day, an adjournment of the Municipal Court action is a matter of legal right. Where the court, upon refusing the request for the adjournment, orders an inquest and judgment is entered in favor of the plaintiff, the imposition of terms upon opening defendant's default is erroneous, and an order so made is appealable. Dorfman v. Hirschfield, 538.

8. *Procedure — Relief from default.*— Where, in a Municipal Court action, the name of the corporation defendant is not correctly stated in the summons and complaint served, and defendant, relying upon the advice of counsel, does not appear, its motion to open the default should be granted upon terms, it appearing by its proposed answer attached to the moving papers that it has a good and substantial defense upon the merits. Cainen v. New York Contracting Co., 640.

Review — Transfer to another district. People ex rel. McGowan v. Murray, 364.

Procedure — Relief from default. Gumbinner v. Burns, 642.

Review — Judgments and orders reviewable — Judgment by default without service of summons. Altieri v. Trotta, 649.

Review — Judgments and orders reviewable — Order denying motion to vacate appearance. Hallahan v. Cambridge Hotel Co., 650.

NEGLIGENCE.
1. *Actions — Trial and review — Questions for jury.*— In an action for personal injuries, resulting in the death of plaintiff's intestate, received in jumping from the fourth story of defendants' burning building in which he was employed, where it appeared that defendants had long neglected to comply with an order of the municipal government requiring them to provide adequate fire escapes, and that plaintiff's intestate, finding a crowd about the only existing fire escape struggling and fighting for access to it and all other means of egress from the building choked with smoke or flames, jumped from a window; and where the questions of defendants' negligence and the contributory negligence of the deceased and the questions of proximate cause, sudden peril and assumption of risks had all been submitted to the jury under instructions to which no exception was taken, and the jury found a verdict for the plaintiff for an amount which is not deemed excessive, a new trial will not be granted. Sembler v. Cowperthwait, 28.

2. *Liability for — Acts or omissions constituting negligence — Dangerous machinery and substances — Persons liable — Manufacturers and*

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NEGLIGENCE — Continued.
sellers of articles causing injury. — It is an act of negligence for a druggist to give to one who asks for something to wash out a wound a solution of carbolic acid so strong as to burn the flesh and turn it black, and the person to whom it is given in response to such a request is not guilty of contributory negligence in using it for the purpose stated. Horst v. Walter, 591.

Actions — Evidence — Presumptions and burden of proof — Presumption of negligence from happening of accident. Fouquet v. New York Central & Hudson River R. R. Co., 121.

See Master and Servant.

NEGOTIABLE INSTRUMENT.

1. *Notice of dishonor — Necessity — Where drawer of check stops payment — Bona fide holders — What constitutes — Parting with value.* — Where one holding a mortgage upon property taken by a municipality for a public use declines to satisfy it upon payment of a sum less than the amount due thereon, but finally, at the request of one of the parties interested in the award, in order to prevent delay in its payment, consents to do so, upon receiving his check for the deficiency, the execution and delivery of such satisfaction is a sufficient consideration for the check. Scanlon v. Wallach, 104.

2. *Accommodation paper — Liability to one who has not parted with value; Bona fide holders — What constitutes a bona fide holder — Parting with value.* — Where a note is given for a preceding note of the same amount made by the same parties and the original note is not surrendered or canceled, the holder has not parted with value and cannot recover thereon against an accommodation maker. Gansevoort Bank v. Gilday, 107.

3. *Actions — Evidence — Admissibility — Ambiguity and extrinsic evidence.* — In an action, brought by the payee, upon a promissory note signed with the name of a corporation followed by the signature of its president, where the note contains the words "we promise to pay" and the president's signature is written in the space contained in a rubber stamp bearing the corporate name which was designed for the signature of the officer subscribing the name of the corporation, the note is ambiguous; and it is error to exclude evidence tending to show that the note was a corporate note, and not the joint note of the corporation and its president, nor the individual note of the president; and a judgment in such case founded upon a verdict directed against the executrix of the president, in an action brought against her upon the note, will be reversed and a new trial granted. Dunbar Box & Lumber Co. v. Martin, 312.

4. *Bona fide holders — What constitutes a bona fide holder — Parting with value — Purchase at less than face value.* — In an action upon a check for $175, valid in its inception, against the drawer who stopped payment on it, it matters not whether the plaintiff paid the payee the full amount of the check or only advanced ten dollars in drinks upon it so long as the plaintiff shows that he is a *bona fide* holder without knowledge of any equitable defenses in favor of the drawer against the payee. Rosenthal v. Freedman, 595.

5. *Presentment and demand — Necessity of demand — As against maker.* — A promissory note payable on demand after date is due forthwith; and, as between the maker and holder, an actual demand is not a condition precedent to an action. Hyman v. Doyle, 397.

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NEGOTIABLE INSTRUMENT — Continued.

6. *Actions — Evidence — Sufficiency.*— Where, in an action upon a promissory note by one claiming to be a *bona fide* holder for value, without notice and in due course, it appears that, as between the original parties, there was nothing due upon it from the makers to the payee; and where the testimony of the plaintiff and her son and the payee of the note sworn on her behalf indicates that the transactions by which she acquired the note were of an unusual character and not at all in accordance with the general usages and customs of business and there are no writings to corroborate it, the question whether the plaintiff was chargeable with knowledge or notice of the equities between the original parties should be submitted to the jury. Dorsett v. Doubleday, Page & Co., 598.

NEW TRIAL.

1. *Grounds: In general — Conditions developing since trial; Newly-discovered evidence — In general.*— In an action to recover damages for personal injuries, where the testimony of the experts was conflicting upon the question whether there was a fracture of the spinous processes of the vertebræ which might be followed by a permanent paralysis of the lower limbs, and the jury rendered a large verdict for the plaintiff; and where, after appeals to the Appellate Division and to the Court of Appeals, no errors were found to have been committed upon the trial, but the lapse of time since the trial and the plaintiff's physical condition have shown that the honestly expressed opinions of experts that the injuries would result in paralysis were not well founded, such subsequent developments cannot be classed as newly-discovered evidence; but, under the exceptional circumstances of the case, and in furtherance of substantial justice, and in deference to the suggestions contained in the opinion of the Court of Appeals in the present case, a new trial will be granted upon payment by defendant of trial costs and costs on appeal. Fogel v. Interborough Rapid Transit Co., 32.

2. *Right to remedy in general — Discretion of court; Grounds — Newly-discovered evidence — Nature and sufficiency of evidence discovered; Proceedings to procure new trial — Bill of exceptions, case, or statement of facts — Necessity for case.*— Where, upon the trial of an action for work, labor and services and materials furnished, defendant claims that the work was ordered through a third person who had been paid in full but who was not sworn upon the trial, and who, plaintiff claims, was simply his agent without authority to receive payment; and where, upon defendant's motion for a new trial on the ground of newly-discovered evidence, defendant excuses the absence of the third person whose affidavit used on the motion shows that he secured the order from the defendant; that he bought the material and did the work in connection with the plaintiff and was financially interested in the transaction, and paid the plaintiff for the materials furnished and work and received a receipted bill which was turned over to defendant, the materiality of the testimony is apparent; and its probative force can be much better determined by a trial court than by a reading of the affidavits; and the motion for a new trial should be granted. A motion for a new trial on the ground of newly-discovered evidence may be made, in the absence of objection, upon the pleadings and affidavits; and an objection that a settled case is necessary under section 997 of the Code of Civil Procedure cannot be raised for the first time upon appeal from the order entered on such motion. In the absence of an apparent abuse, the discretion of the court in granting a motion for a new trial on the ground of newly-discovered evidence will not be disturbed. Rosenthal v. Bell Realty Co., 265.

3. *Grounds — Verdict or findings contrary to law or evidence — Verdict contrary to evidence — Credibility of witnesses.*— Where the plain-

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NEW TRIAL — Continued.
tiff's cause of action is supported only by his own testimony but there is no inherent improbability in his story and he is not contradicted, impeached or discredited, the jury may not disregard his testimony and find a verdict for the defendant. Kahl v. New York City R. Co., 566.

4. *Grounds — Verdict or findings contrary to law or evidence — Verdict contrary to instructions — Joint agreements and liabilities — On contracts — Under joint debtor acts — Compromise by joint debtors.* — Where a verdict is found contrary to the instructions of the court, it will be set aside without regard to the legal accuracy of the instructions; but only the party aggrieved by the disobedience of the jury has a right to complain. Kaplan v. Shapiro, 606.

OFFER AND ACCEPTANCE.
Sufficiency of acceptance — Implied acceptance — Performance of terms of offer — Signature by one party only. Ætna Indemnity Co. v. Ryan, 614.

See Principal and Surety.

PARTIES.
1. *Defendants — Who must be joined.* — A complaint, which alleges that certain persons not parties to the action received stock of the defendant corporation in consideration of their personal promissory notes and in violation of section 42 of the Stock Corporation Law; that said persons are a majority of the directors of the corporation and in control thereof and, by means of the stock which they have thus illegally received, can control the pending election of the corporation, and which concludes by praying that the defendant be enjoined from permitting votes to be cast on said stock, is demurrable upon the ground of a defect of parties defendant. Jones v. Nassau Suburban Home Co., 63.

2. *Plaintiffs — Joinder of plaintiffs — Who may be joined — Owners of separate lands in action to abate nuisance.* — Several owners of separate parcels of land cannot unite in an action against a railroad company for damages to their respective lands from the flooding thereof by a stream whose natural flow has been impeded by the abutments of a bridge erected by the defendants, but they may unite in an action to abate the nuisance; and neither the allegations of damage nor the demand of separate money judgments render the complaint demurrable. Burghen v. Erie R. R. Co., 457.

See Appeal.

PARTITION.
Sale and proceedings thereafter — Disposition of proceeds — Deduction of incumbrances. — Where, by the interlocutory judgment in an action of partition, it is decreed that a mortgage upon the premises, more than twenty years past due at the commencement of the action, was valid and that there was due thereon a certain amount besides certain taxes paid by the mortgagee, who was made a party defendant in the partition action, the final judgment should provide that the necessary expenses of the partition sale and the taxes should first be paid and that the balance be paid to the defendant mortgagee on account of his mortgage. Goebbles v. Morrisey, 421.

PARTNERSHIP.
See Receivers.

PLACE OF TRIAL.
See Venue.

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PLEADING.

1. *Complaint or declaration — Conditions precedent — Performance or waiver.*— Where a complaint sets forth an agreement containing several stipulations which might or might not be construed as conditions that must be complied with before the plaintiff can put the defendant in default, a further allegation that "all the conditions above mentioned were fulfilled or were waived by the defendants" determines the character of such conditions and requires that the facts constituting performance and waiver should be alleged; and, in the absence of such allegations, a demurrer to said complaint should be sustained. Speare's Sons' Co. v. Casein Co., 58.

2. *Complaint or declaration — Statement of cause of action in general; Demurrer — Hearing and determination — Nature of relief demanded.*— Where a plaintiff's right of action, because of the absence of any allegation as to the legal effect of the contract sued on, must be inferred from the contract which constitutes the parties joint undertakers in a stock venture, the profits and losses to be borne equally, with the right to call each other to account, and contemplates both the holding and sale of stock, and where, although the complaint fails to allege a cause of action for an accounting of profits and losses or for contribution, the same may be inferred from other allegations and the facts may be regarded as sufficient to constitute a cause of action for terminating the joint engagement but the prayer for relief is for a sum of money only, the complaint does not state facts sufficient to constitute a cause of action for an accounting and contribution. And where, in such a case, the stock still remains with the parties and the loss therein has not been determined by an actual sale, a mere allegation of its worthlessness will not serve as a sufficient foundation for an action for debt. Jones v. McNally, 59.

3. *Amendments — By leave of court — Amendments to conform to proof.*— In an action upon a bank check it is not necessary that the complaint should state that notice of the dishonor of the check was given to the drawer in a case where the drawer stopped payment of the check, but it should contain an allegation that payment was stopped. Where no such allegation was contained in the complaint, but the fact that the drawer stopped payment was proved, without objection, the complaint should be made to conform to the proof. Scanlon v. Wallach, 104.

4. *Amendments — Amendments by leave of court — Subject-matter of amendment — Defects amendable in general — New or different cause of action.*— In an action upon an assigned claim for medical services rendered to defendant's mother at a sanatorium upon his request, the court may, under section 723 of the Code of Civil Procedure, allow the plaintiff to amend by changing the name of his assignor, without prejudice to the position of the case upon the calendar, where no change is made in the statement of the nature of the services, to whom rendered, and the time during which, the place where and the price at which such services were rendered. Thompson v. Young, 250.

5. *Amendments — Amendments by leave of court — Time for amendments — After verdict — To conform to proof.*— In an action of replevin, where the proof showed a joint ownership of the property in question in the plaintiff and defendants and judgment was rendered in conformity with such facts, upon appeal by plaintiff, the answer, which alleged individual ownership in the defendants, will be amended to conform to the proof, and the judgment will be affirmed. Alexander v. Harkin, 317.

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PLEADING — Continued.

6. *Evidence admissible under the pleadings — In general — Evidence in reply to defense set up in answer.*— In an action to recover the amount paid for two steamship tickets which were invalid and worthless where the defendant sets up a general release the plaintiff may show that he did not know the contents of the instrument and signed it in consequence of a misrepresentation as to its import. Creshkoff v. Schwartz, 576.

Supplemental pleadings — Supplemental complaint — New cause of action where none previously existed. South Shore Traction Co. v. Town of Brookhaven, 392.

Demurrer — Grounds of demurrer to complaint — Surplusage. Burghen v. Erie R. R. Co., 457.

See Master and Servant; Parties.

PRINCIPAL AND AGENT.

Mutual rights, duties and liabilities: Construction and execution of contract and powers of agent — Fraud of sub-agent or employees of agent; Remedies as between the parties — Actions against agent for property or account — Defenses in general.— Where a mercantile agency company having a claim to collect receives the debtor's checks therefor payable to the order of the creditor and one of the company's agents forges the creditor's indorsements and deposits the checks with a trust company which collects them and turns over the proceeds to the depositor; and where the creditor thereafter sues the trust company and compromises its claim for less than the full amount and then sues the mercantile agency the latter cannot set up as a defense a release, given by the plaintiff to the trust company upon the compromise of the suit against it, which was expressed to be without prejudice to plaintiff's claim against the mercantile agency. Such a release does not impair any remedy which the mercantile agency may have against the trust company. Morris v. North American Mercantile Agency Co., 574.

PRINCIPAL AND SURETY.

1. *Discharge of surety — Accepting successive bonds; Remedies of creditor — Necessity for demand on surety.*— In January, 1901, defendant with certain other of the stockholders of a domestic corporation, as security for loans and other pecuniary accommodations from a bank, jointly and severally executed an indemnity bond which recited that it was intended to be a full, complete and perfect security and indemnity to said bank for one year for any indebtedness or liability of any kind owing by the corporation to the bank from time to time and should be valid and continuous without other or further notice to them, and provided that the liability thereunder was not at any time to exceed $15,000 and interest. In January, 1902, a new and similar bond was given by the same persons to secure all then existing indebtedness of the corporation to the bank, as well as all that should be contracted within one year, subject to the same limitation as to the liability. The corporation was adjudicated bankrupt in the following July, at which time the bank held its notes and obligations under discount to the amount of about $60,000 in addition to $7,500 in mortgage bonds issued by it in 1894 and acquired by the bank before the execution of the second indemnity bond. In 1904, before said mortgage bonds had matured, an action was brought against the defendant upon the bond of 1902 and a verdict directed for plaintiff to the amount of notes with interest discounted after the execution of said bond which amount, with interest, was paid without the entry of judgment. In an action against defendant, as the only solvent surety upon the bond

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PRINCIPAL AND SURETY — Continued.
given in 1901, which was produced on the trial by plaintiff, to recover the amount of the mortgage bonds which had been acquired before the execution of the second indemnity bond, the defendant plead in bar the former recovery and payment. Held, that whether the bond of 1902 was a substitute for the previous one was a question of intention and, there being nothing in the form of the bond of 1902 which necessarily indicated such an intention and the earlier bond not having been surrendered or canceled, the presumption was that it remained in force. First National Bank v. Story, 429.

2. *Remedies of creditor — Necessity for demand on surety.* — An action cannot be maintained upon the contract of a surety, who agrees to make good upon demand up to a certain amount, any loss on account of misappropriation of funds collected by his principal, until a demand has been made. Heinemann v. Brasch, 552.

3. *Rights and remedies of surety against principal — Compensation for use of credit — Under contract with surety company.* — An application for a surety bond signed by the applicant in consideration of the mutual covenants of the surety company and delivered to, accepted by and acted upon by the company constitutes a complete contract between the parties. Where a bond given for the faithful performance of a contract with a municipality, dated January 25, 1904, to erect a hook and ladder building required the contractor to annually pay the premiums on the bond until the completion and acceptance of the work covered thereby, of which facts he agreed to notify the surety company in writing, and under one of the specifications of the contract all roofing, gutters, etc., were to be warranted and maintained for twelve months after the completion of the building, the liability of the surety company ceased only upon acceptance of the work by the city. In an action brought in September, 1906, to recover the premiums for 1905 and 1906 which were payable in advance on January 25 of each year, the reception of the testimony of a clerk in the city comptroller's office that the bond given under the contract was still in force is clearly improper, where the fact of the completion and acceptance of the work is not shown to have been within the knowledge of the witness, but error in admitting his testimony is cured, where the contractor testifies that the work was completed in March, 1905. As the plaintiff's liability continued to March, 1906, it was only entitled to recover premiums up to that date, although defendant had given no written notice that the work had been completed and accepted. As the liability of the surety company was to continue until "completion and acceptance", the time of the completion of the work must be deemed to be coexistent with the acceptance; and the liability of the surety company continued until both contingencies occurred. Aetna Indemnity Co. v. Ryan, 614.

See **Former Adjudication.**

PROBATE.
See **Wills.**

PROCESS.
Issuance and formal requisites — Attorney's office address — Addition of street number in city.—The omission of the street number from the address of plaintiff's attorney subscribed to a summons is not a jurisdictional defect but a mere irregularity; and where defendant, having actual knowledge of such office address, retains the summons, a motion to set aside service thereof and vacate the judgment entered in the action is properly denied. Sullivan v. Harney, 249.

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PROHIBITION.
Nature and grounds — Existence and adequacy of other remedies — Certiorari. People ex rel. Crowley v. Butler, 366.

PROMISE.
See Statute of Frauds.

RECEIVERS.
1. *Nature, grounds and subjects of receivership — Particular actions and proceedings — Actions affecting partnerships.*—Where an action is brought for the dissolution of an alleged partnership and the appointment of a receiver, and the existence of the partnership is denied, and there is a serious conflict with respect to the transactions and statements of the parties, from which their intentions and the nature of the agreement between them must be determined, and facts are not stated from which danger may be apprehended that the profits of the business will be appropriated by the defendants who are managing it or dissipated, and there are no averments of fraud, mismanagement or dissipation of assets, and the defendants are financially responsible and the circumstances indicate that the successful management of the business requires that the defendants should remain in charge, the case has not been brought within the provisions of section 713 of the Code of Civil Procedure relating to the appointment of receivers; and plaintiff's motion for a receiver should be denied. Bimberg v. Wagenhals, 13.

2. *Appointment, qualification and tenure of receivers — Operation and effect of appointment — Collateral attack.*—Where a receiver was appointed in this State of the property of a corporation organized under the laws of New Jersey, of which a receiver had been previously appointed in the latter State, and gave a bond with sureties conditioned for the faithful discharge of the duties of his trust as such receiver; and where a judgment was thereafter recovered against the receiver in this State and an order was made directing him to pay the judgment, which he failed to do, in an action brought by the owner of the judgment against the sureties upon the receiver's bond, held, that the judgment against the receiver and the order directing him to pay it were evidence against the sureties and concluded them as to their liability upon the bond, although the motion for the order directing payment by the receiver was not made in the district where he was appointed nor upon notice to the Attorney General as required by L. 1883, ch. 378. Coe v. Patterson, 412.

RECORD.
Recording written instruments and notice of title — Record of instruments as affecting priority between instruments or rights — Effect of record in general — Persons affected by record. Muller v. Goerlitz, 53.

Recording written instruments and notice of title — Sufficiency of record to constitute notice — Effect of defects in instrument. Schefer v. Ball, 448.

See Bankruptcy.

REFERENCE.
1. *Report and findings — Time for making report.*—A party may not, under section 1019, of the Code of Civil Procedure, terminate a reference within sixty days after the time when he submits to the referee his proposed findings of fact and conclusions of law. As to him the time within which the referee is required to make his report will not begin to run before the date of such submission. Burritt v. Burritt, 26.

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REFERENCE — Continued.

2. *Report and findings — Time for making report, etc. — Notice to terminate — Not applicable to references by surrogate.* — The provision of section 1019 of the Code of Civil Procedure for the termination of a reference where the referee's report is not filed or delivered submitted sixty days from the time when the cause or matter is finally submitted does not apply to a reference by a surrogate to take proof and report under section 2546. Section 1019 of the Code of Civil Procedure does not limit the time within which a referee has jurisdiction to act in the absence of an election by the parties or one or more of them to terminate the reference. The time within which a referee is required to report may be extended and the provisions of section 1019 may be waived by the parties not only by formal stipulation but by such conduct as in fairness estops a man from taking advantage of the strict letter of the law. A case is not to be deemed closed although the taking of testimony has been concluded while the referee, in good faith, at the request of any party, holds the reference open to enable such party to submit a thing that he deems material though the thing to be submitted may appear to be unnecessary and not controlling. Matter of Robinson, 171.

REFORMATION.

Of instruments — Right to remedy — Grounds — Mistake in supposed duplicate. — Where the parties intend to execute an agreement in duplicate but one of the copies, by mistake, does not conform to the agreement of the parties, parol evidence is competent to show which of the two papers embodies the real agreement, and a case is not presented for the interposition of a court of equity to reform the erroneous copy. Bowman v. Poppenberg, 373.

REMAINDERS.

Remedies of remaindermen for injuries to estate — Erection of elevated railroad. Muller v. Manhattan R. Co., 133.

SALES.

Remedies of seller — Action for price — Accrual of right of action — Conditions precedent. — Where, under the terms of an agreement for the sale of goods, the purchaser is to pay for them in thirty days, the performance of an agreement by the seller to publish certain advertisements thereof within one year is not a condition precedent to the recovery by the seller of the purchase price; and, in an action therefor, the seller need not allege nor prove performance of his agreement to advertise. Vio Chemical Co. v. Studholme, 470.

SERVICE.

Of papers — Manner of service — Service by mail — Time of service — Time to amend pleading not doubled by serving original by mail. — Service of an original answer by mail does not entitle the defendant to double time within which to serve an amended answer. Seckel v. Tangemann, 268.

See **Process.**

SERVICES.

See **Executors and Administrators.**

SET-OFF AND COUNTERCLAIM.

Subject-matter — Claim on contract against claim founded on tort. Beale Furniture Co. v. McGrorty, 643.

SHIPS AND SHIPPING.

Liabilities of vessels and owners — Contracts of master for supplies. Commercial Nat. Bank v. Sloman, 97.

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SLANDER.
See Libel.

SPECIFIC PERFORMANCE.
1. *Actions — Retention for award of damages.*— In an action by the vendee for the specific performance of a contract for the sale of real estate, where it is alleged in the complaint that the defendant is unable to convey to the plaintiff a good and marketable title to the premises free from all incumbrances except those mentioned in the contract, the complaint will not be dismissed; but the cause will not be stricken from the equity calendar and transferred to the calendar for the trial of issues by a jury. Messenger v. Chambers, 117.

2. *Subject-matter of enforceable contracts — Contracts to transfer stock.*— One who advances money to purchase mines, upon the agreement that a corporation shall be formed and that he shall receive for such advances a proportionate share of the capital stock of the corporation, may maintain an action for the specific performance of the contract when the stock has no known or definite value and his damages are, therefore, incapable of ascertainment. Rau v. Seidenberg, 386.

STATUTE OF FRAUDS.
Promise to answer for debt, etc., of another — New consideration — Forbearance.—Where one, who states that he has succeeded to another's business, writes to one of the latter's creditors that additional capital necessary to develop the business will be forthcoming and asks the creditor's indulgence until matters are straightened out, which he hopes will be soon, when the creditor's account will be taken up, and, relying upon the letter, the creditor forbears to sue the original debtor, such request for indulgence and promise, followed by the creditor's forbearance for a reasonable time, will render the promisor liable for the payment of the creditor's claim though no definite period of forbearance was specified. Niles-Bement-Pond Co. v. Ury, 305.

Promise to answer for debt, etc., of another — New consideration — Promise not within statute. Schnaufer v. Ahr, 299.

STATUTE OF LIMITATIONS.
1. *Limitation of actions — Disabilities and exceptions — Infancy and coverture — Period after termination of disability.*— Under the last will of testator, who died in 1875 survived by his widow and six minor children, certain real estate in the city of New York was devised to the widow for life or widowhood, in lieu of dower, with remainder to the children or their descendants. The widow having remarried in 1888, the premises were thereafter sold under a judgment in partition. Since 1878, an elevated railroad has been maintained and operated in front of said premises under a claim of lawful authority and under a claim adverse to the purchaser at the partition sale and his predecessors in title and exclusive of every other right. In an action to restrain the maintenance and operation of said railroad in front of said premises and for fee and rental damages; held, that, notwithstanding the intervening estate of the widow, a remainderman, under section 1665 of the Code of Civil Procedure, could have maintained such an action as for an injury done to his inheritance; that the remainderman's right to maintain such action first accrued upon the day in 1878 when the railroad company began to operate its road; that, as the eldest remainderman had, under section 375 of said Code, twenty years after she became of age in 1881 to commence suit, an action brought in 1899 by the purchaser at the partition sale who succeeded to all the rights of the remaindermen was not barred by the Statute of Limitations. Muller v. Manhattan R. Co., 133.

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STATUTE OF LIMITATIONS — Continued.

2. *Limitation of actions — Revival of obligation — Acknowledgment and new promise — Nature of promise or acknowledgment.*—An acknowledgment of a debt contained in a letter is sufficient to take the case out of the Statute of Limitations if the writer only recognizes the debt and admits that he is the debtor and although the letter is written after the commencement of the action. Willis v. Wileman, 462.

STATUTES.

See Corporations; Eminent Domain; Mechanics' Liens; Municipal Corporations; Taxes; Towns; Trusts; Wills.

STAY.

Of proceedings — Supersedeas or stay by proceedings for review — Allowance or order for stay — Necessity for allowance.—Where a judgment directing defendant to remove forthwith certain obstructions from plaintiff's premises is affirmed by the Appellate Division, the usual undertaking to perfect an appeal to the Court of Appeals, pursuant to section 1326 of the Code of Civil Procedure, does not stay the judgment; but, where it appears that defendant's failure to obey the judgment was because of an honest belief that the giving of the undertaking effected a stay, a motion to punish him for contempt will be denied, upon condition that, if within five days after the service of notice of the entry of the order denying such motion, defendant fails to move for a stay of proceedings on notice, or if he makes such a motion and does not bring it diligently on for argument, or a stay is granted upon terms not complied with, or denied, the motion to punish him for contempt may be renewed. Sagehomme v. Pugh & Co., 41.

STREET RAILWAYS.

1. *Street railway companies, their franchises and right to use of streets — Franchise and right to use streets — Conditions imposed by municipality — Performance of condition — Effect of non-performance.* — A street railway company, to which a franchise from a municipality to lay its road in certain public streets was granted upon condition that the company should file a bond, to be approved by certain municipal officers, indemnifying the municipality against claims for damages during the construction of the road and should also complete its road within a certain time, having failed to complete its road within the given period or to file the required bond, and having, after the expiration of such period and without filing such bond, brought an action to restrain the municipality from granting a franchise to another company to lay a railway in the same streets, and having procured a temporary injunction in such action conditioned upon its giving a bond, as required by its franchise, and having thereafter filed a bond with the required conditions, may not, after the order for the temporary injunction has been reversed on appeal for the failure of the plaintiff to comply with the conditions of its franchise before the order was granted, be permitted to file a supplemental complaint showing its subsequent compliance with such conditions. A plaintiff may not, by supplemental complaint, establish a cause of action where none existed at the time the suit was brought. Nor can a new injunction be granted after the filing of the bond since the supplemental complaint cannot be filed and the original complaint fails to show a cause of action. Nor will an injunction be granted in another similar case where the complaint shows the filing of a bond but fails to show that the bond was approved as required by the condition of its franchise. Moreover, the condition of the franchise must be construed to require the filing of the prescribed bond within a reasonable time; and the filing of a bond after more than three years had elapsed and the period within which the road was to be completed had expired was too late

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STREET RAILWAYS — Continued.
to satisfy the condition. And the failure of the plaintiff to construct its road within the required time, though it may not work a forfeiture of its franchise, furnishes a sufficient reason for denying it equitable relief. South Shore Traction Co. v. Town of Brookhaven, 392.

2. *Operation — Actions — Sufficiency of evidence — Negligence on part of company in general.*— In an action against a subway company using the streets under authority of law, for personal injuries from an explosion of gas which occurred when some unknown man held a lamp near a manhole, the cover of which was off, where it does not appear how the gas came to be in the subway, negligence of the company is not to be inferred from the mere happening of the accident, though it appears that the company kept the subway in repair. Robinson v. Empire City Subway Co., 593.

STIPULATIONS.
Relief from stipulations — Grounds for relief. Hering v. Land & Mortgage Co., 644.

SUMMARY PROCEEDINGS.
See Landlord and Tenant.

SUNDAY.
Judicial proceedings on — Awards.— An award is not invalid because it was discussed and practically agreed upon on Sunday, where it was not made, published nor delivered until the following day. Ehrlich v. Pike, 328.

SUPPLEMENTARY PROCEEDINGS.
Procedure in general — Setting aside — Time to move on ground judgment improperly entered.— It is too late for a judgment debtor, after having submitted to an examination in supplementary proceedings to move to vacate the order for the examination on the ground that the judgment was not preperly entered. Matter of Gerhard Mennen Chemical Co. v. Dressner, 370.

SURROGATE'S COURTS.
Nature and extent of jurisdiction — Administration of decedent's estates — Settlement of claims on accounting by representatives — Claims against representatives — For transfers from decedent induced by fraud.— Where a claim that an accounting executrix should be surcharged with the value of certain bonds and mortgages involves the question of whether their assignment had been procured by fraud, the Surrogate's Court has not jurisdiction to pass upon the claim. Matter of Dittrich, 511.

Procedure and review — Referees, auditors and assistants — Termination of reference. Matter of Robinson, 171.

See Reference.

SUSPENSION OF POWER OF ALIENATION.
Validity of particular future estates — Where executor has power of alienation.—The Statute of Perpetuities is pointed only to the suspension of the power of alienation and not at all to the time of its exercise; and no suspension of the power of alienation arises merely from the possible non-action of executors to whom a power of sale is given. In the case of a trust for sale and distribution without restriction as to time where the trustees are empowered to receive the rents and profits pending the sale for the benefit of beneficiaries, the

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SUSPENSION OF POWER OF ALIENATION — Continued.
fact that the interest of the beneficiaries is inalienable by statute during the existence of the trust does not constitute a suspension of the power of alienation. Keyser v. Mead, 114.

2. *Effect of separability of estates — Separate trusts for more than two lives.*—The title to the trust estate did not vest in the legatees and devisees upon the death of testator but the members of each class took a future contingent estate in the property of the particular share subject to be defeated by death before the death of the life beneficiary, and, also, subject to the exercise of the power of sale by the trustees. Four separate and distinct trusts were created, each for the period of one life in being, and there was no unlawful suspension of the power of alienation. Bascom v. Weed, 496.

Validity of particular future estates — Suspension within the limitation. Liebmann v. Liebmann, 488.

See Wills.

TAXES.

1. *Equalization, correction and review of assessments — Certiorari — Review — Reference.*—Where in certiorari proceedings, twenty-one in number, brought by eight separate and distinct sets of relators to review assessments for taxation for two or more years of various large parcels of improved real estate in the city of New York, the issue is that the relators' property is assessed higher in proportion to its value than other property in the tax rolls, and it is clear that the testimony of experts, whose time is so occupied that it might well be impossible to assemble them and to keep them together for the purpose of trial in court, will be offered in evidence and that the interests of justice require that ample opportunity to cross-examine them and to introduce testimony in rebuttal should be afforded, the court, in the exercise of the discretion conferred upon it by section 253 of the Tax Law (L. 1896, ch. 908), may send the proceedings to various referees under orders containing such reasonable provisions for expediting the proceedings as may be agreed upon. People ex rel. Stewart v. Feitner, 334.

2. *Persons, objects and interests taxable — In general — Deductions — Debts for the purchase of non-taxable property.*—A stock exchange seat is non-taxable property; and, where the purchaser of a seat in the New York Stock Exchange, in compliance with its constitution and by-laws and in order to obtain its assent to the transfer of the seat and his admission to membership, procures from the person from whom he borrowed the purchase price a general release to him of all claims and demands arising out of the loan, which is delivered to the exchange, and, thereafter, realizing the moral obligation, he promises to pay the lender the amount of the loan with interest, he is not, under section 6 of the Tax Law (L. 1896, ch. 908) which provides: "No deduction shall be allowed in the assessment of personal property by reason of the indebtedness of the owner contracted or incurred in the purchase of non-taxable property", entitled to deduct the amount of the loan from his personal assessment. People ex rel. Slade v. Commissioner of Taxes, 336.

3. *Taxation of mortgages on real property — What mortgages are taxable — Mortgages upon chattels real.*—A lease for five years is a chattel real and does not lose its character after the expiration of two years of the term; and it is, therefore, real property within the meaning of the Mortgage Tax Law (L. 1906, ch. 532). People ex rel. Elias Brewing Co. v. Gass, 363.

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TAXES — Continued.

4. *Place of taxation — Lands in more than one district.*—Where a tract of land comprising 1,335 acres besides highways and marsh lands is situated partly in each of two adjoining towns, having several dwelling houses in each town, each having an orchard, farm buildings and a tract of land that might be called a farm, in no one of which houses the owner resides, but the owner's son who manages the whole property for her lives in one of them, the others being occupied by employees and their families, and near the son's house are barns and a warehouse to which many crops are drawn from both towns as soon as harvested but horses, cattle and farm implements are kept at the different houses and used indiscriminately upon the whole tract and no fence separates the lands lying in one town from those in the other, the fact that the larger and more valuable dwelling house is occupied by the owner's son does not constitute it *the* dwelling house within the meaning of the Tax Law authorizing the assessment of a farm divided by a line between two tax districts in the district where the dwelling house or other principal buildings are located; and the provision relating to the location of other principal buildings for the purpose of controlling the place of taxation was intended to apply only to cases in which there was no dwelling house upon the tract. The present case does not, therefore, come within the exception to the general rule that land is to be assessed in the tax district where it is located. Chamberlain v. Sherman, 474.

TITLE.

See **Vendor and Purchaser.**

TOWNS.

Power of towns, government and town meetings — Power of majority of electors to validate claims; Audit and allowance of claims against towns — By vote of town meeting — When not conclusive; Rights and liabilities on contracts — Liability for services of attorney.—Where town highway commissioners receive notice of an application for the appointment of commissioners to lay out a proposed new highway they may present the matter to the town board and that body may, by resolution, employ counsel to defend the application in behalf of the town. Where town highway commissioners, upon the written request of the individuals composing the town board, with the intention to serve the best interests of the town, employ counsel to oppose the laying out and building of a proposed new highway, in which opposition they are successful, largely to the benefit of the town, they should settle with their counsel for his fees and disbursements and present a claim therefor to the town auditors as a necessary expense incurred in the discharge of their duties as highway commissioners; and, upon a disallowance or unreasonable reduction of their claim before allowance, their remedy is by certiorari. The rejection of a claim against the town, made directly by the attorney for his services and submitted to the town meeting, is not a rejection of a claim of the commissioners of highways for disbursements to counsel. In an action brought in the County Court against the highway commissioners as individuals, for services as counsel in opposing the laying out and building of the proposed new highway, a notice addressed to the individuals upon whose request plaintiff was employed, to the effect that they should defend the suit and would be held liable both individually and as members of the town board for any damages and costs sustained by the defendants in the action by reason thereof, is not sufficient notice to the town to come in and defend; the town at that time having no interest whatever in defending the claim sued on. After affirmance by the Court of Appeals of a judgment in such action in the plaintiff's favor, by which the amount of his claim for services and

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TOWNS — Continued.
expenses in the proceeding to lay out the highway was fixed at $435.60, a special town meeting voted that the town board pay and reimburse the commissioners for all liability incurred and sums of money paid, laid out and expended by them or either of them in defending the action and in satisfying the judgment and thereafter a claim by the commissioners of highways for $1,345.62 was allowed by the town board at $1,130.72 which amount was returned to the board of supervisors to be included in the tax levy of the town. In an action by a taxpayer to have the action of the special town meeting relative to the allowance of said claim declared illegal and void and the audit and allowance thereof by the town board declared illegal and void and to restrain the board of supervisors from indulging the amount allowed therein in the tax levy against the town, held, that the only legal obligations against the town were those for attorney's fees and expenses incurred in the proceeding to lay out and build the highway; that the expenses of the attorney's action against the commissioners of highways and the expenses upon the appeals in the case were not expenses incurred for the use or benefit of the town and that the majority of the taxpayers at a special town meeting could not make them valid claims against the town; that the fact that the plaintiff in the taxpayer's action was one of the individuals who signed the request to the commissioners of highways to contest the laying out of the proposed new highway did not estop him from prosecuting the action, as such request was in no sense a consent that the expenses of the action by the attorney to recover for services or upon the appeals from the judgment in his favor should be incurred. McCoy v. McClarty, 69.

TRESPASS.
Actions — Right of actions and defenses — Title and possession — Highways.— Upon an appeal from a justice's judgment, awarding treble damages for breaking off a limb from a tree in front of plaintiff's premises, plaintiff made no claim to be the owner in fee of the street. Held, that the defendant was a trespasser and that plaintiff was entitled to recover his actual damages and was entitled to recover such damages without regard to whether the defendant was negligent or not, but was not entitled to treble damages, and that the judgment should be modified accordingly. Kellar v. Central Telephone & Telegraph Co., 523.

TRIAL.
Taking case from jury and nonsuit — Weight and sufficiency of evidence — Evidence of defendant supplying defects in plaintiff's proof. —Where a motion is made by the defendant at the close of plaintiff's case for a dismissal for a defect in the proof and erroneously denied, defendant's subsequent admission of the facts not proved cures the error. Reshofsky v. Weisz, 602.

See **Venue.**

TRUSTS.
1. *The beneficiary, his estate, rights and interest — Alienability of interest — Trusts of personal property.*— Where a certain sum of money is bequeathed to executors in trust to invest and to pay the net income thereof to testator's two sisters in equal shares and to pay the entire net income to the surviving sister, and upon her death to pay over the *corpus* of the trust estate to such person or persons and in such manner as such surviving sister shall during her lifetime by will or otherwise have directed, the right of each of the beneficiaries in the trust fund is, under section 3 of the Personal Property Law (L. 1897, ch. 417), incapable of transfer by assignment or otherwise; and an assignment by the beneficiaries of both the income and the *corpus* of the trust

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TRUSTS — Continued.
estate is ineffectual to frustrate the testator's purpose to provide a life income for each of them and cannot be enforced. Garrett v. Duclos, 140.

2. *Nature and elements in general — Gift to corporation for corporate purposes does not constitute a trust; The trustee, appointment, etc.— Beneficiary as trustee — Incorporation and organization — Contents of articles.*— Where a testator gives to an incorporated hospital a sum of money, to be used, while said corporation maintains a hospital in Troy, for maintaining a room for the use of persons to be admitted in a certain manner, two churches of said city having respectively the first and second right to select those who shall occupy it, and with the provision that the corporation shall before receiving the fund execute an agreement to administer the fund as required by the will of the testator; and where the intention and purposes of the testator are all within the corporate powers of the corporation, whose board of directors is competent to make rules and regulations to carry out the details of the testator's expressed wishes, held, that it was the intention of the testator to make an absolute gift to the corporation for the purpose of its incorporation, not limited to the period during which it might maintain a hospital in Troy, the income to be used for a certain length of time in a particular manner. Matter of Roche, 187.

3. *The beneficiary, his estate, rights and interest — In general — Distinguishing between capital and income.*—Where a testator creates a trust to receive the rents, issues and profits of his estate and to apply the same to the use of certain beneficiaries and part of such estate consists of corporate shares, and where the corporation thereafter declares a dividend of its profits accumulated before the death of the testator and pays the same in new shares of stock, the stock so issued is to be deemed income and goes to the beneficiaries. The fact that the aggregate income from the estate exceeds the amount required to be applied to the purposes designated in the will does not constitute an unlawful accumulation, but the surplus income will be ordered to be paid to the persons presumptively entitled to the next eventual estate. Matter of Harteau, 201.

4. *The trustee, appointment, etc.—Appointment by the court — On insanity of trustee; Execution and administration of trust — Nature of trustee's title and establishment of estate — Title vested in trustee.* —The provision that the trustees, if any of the grandchildren were minors at the time of the falling in of the life estate, were required to hold possession of the shares of such minors during their minorities, respectively, did not prevent the vesting of the title in them immediately upon the death of the life beneficiary, the enjoyment of which was postponed until their majority. The devise to the trustees and the power of sale were limited to the purposes of each trust, and such power, if exercised in respect to any one trust, was required to be exercised before the termination of such trust by the death of the life beneficiary, as the property of each trust thereupon became vested in the persons belonging to the class named in the devise; and the trustees were not vested with an absolute title to the estate. The trustees, not having exercised the power of sale in respect to the share devoted to the support of the daughter, her children upon her death became immediately vested with the absolute title to said share and being of age are entitled to its immediate possession; they take as tenants in common and, as against the trustees and those holding future contingent estates in the other shares, they are also tenants in common and have a right to a division and partition of their share from the other three shares as provided by the Code of Civil Procedure. Bascom v. Weed, 496.

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TRUSTS — Continued.

The beneficiary, his estate, rights and interest — Alienability of interest; Execution and administration of trust — Powers of co-trustees. Hilton v. Sowenfeld, 152.

See Wills.

VALUES.

***Market — How established: Evidence of market value.*— Market value is a price established by sales of property of the same kind to so great an extent and in so many instances that the value becomes fixed. Rau v. Seidenberg, 386.**

Market value — Evidence of value of corporate stock. McAlpin v. Garden, 401.

See Damages.

VENDOR AND PURCHASER.

1. *Enforcement generally — Action by purchaser for recovery back of purchase price — Burden of proof and presumptions.*— The burden is upon the vendee, under a contract for the sale of real estate, to show that his rejection of the title was for a good and valid reason. Where a vendee, under a contract for the sale of certain real estate, occupied by a tenant and sub-tenant, seeks to recover a deposit made as part of the purchase price, upon the ground that he had rejected the title because the lease had not been terminated as prescribed therein, and it appears that the tenant had agreed to annul the lease and had surrendered the premises, it will be presumed, in the absence of proof to the contrary, that the surrender of the original lease was executed in conformity with the terms of the lease and that the sub-tenant's rights had been extinguished. Weintraub v. Weil, 325.

2. *Title and incumbrances — Title derived through guardian.*— Where the mother and surviving parent of an infant who had an interest in certain real estate acquired the title thereto a few days after it had been sold, under an order in a proceeding to sell the infant's real estate instituted upon the petition of the mother, the circumstances are sufficient to create a reasonable doubt as to the good faith of the proceeding and as to the marketability of the title, and the vendees, under a contract of sale with the mother as owner, are entitled to recover back their deposit and the expenses incurred in the examination of the title. Feller v. Mitchell, 486.

3. *Performance of the contract — Time for performance — When of the essence of the contract.*— In an action at law to recover a deposit made under a contract for the sale of real property, or for damages for a breach thereof, the time appointed for a delivery of the deed will not be regarded as of the essence of the contract, although a precise day and hour are fixed, unless by express provision performance upon the day and hour named is made matter of substance of the contract, or where previous to the day set for closing the title reasonably sufficient notice has been given to the vendor that, sor specified reasons, prompt performance of the contract is required. Where a contract for the sale of real property contains no provision making prompt performance any part of the substance of the agreement, and the intending purchaser, before the time set for the delivery of the deed, gives no notice to the vendors that she requires prompt performance but appears at the time and place appointed for the closing of the title and after waiting some time tenders the amount due under the contract to the attorney who has charge of the matter and immediately thereafter leaves the office saying she can wait no longer and that if the vendors come

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VENDOR AND PURCHASER — Continued.
to inform them that she will refuse to take title because the building is not ready; and where, in an action by her to recover the deposit made on the execution of the contract and for damages for the breach thereof, it is shown that the vendors' failure to appear at the stipulated time was not intentional but due to a mistake on their part as to the hour fixed for closing title and that they were at all times subsequent to their tardiness in appearing on the day named, able, ready and willing to perform the contract on their part and notified the plaintiff to that effect but she ignored all such notices, time is not of the essence of the contract; and the failure of the defendants to appear at the time and place agreed upon was excusable and did not of itself constitute a breach of the contract, and plaintiff's tender and demand were premature and she was not in a position to insist on a rescission of the contract or to maintain her action. Kaufmann v. Brennan, 621.

VENUE.
1. *Place of trial — Residence or domicile of parties — What constitutes residence.* — Where, on a motion to change the place of trial on the ground that plaintiff did not reside in Nassau county where he laid the venue, the only statements are that for several years plaintiff's name has appeared in Trow's New York City Directory with a house address in said city, and that, in a petition in a legal proceeding, he stated that his permanent residence was in said city, but stated in an affidavit in the presence motion, in explanation, that he did not mean he had changed his domicile or legal residence from Nassau county but that he would remain in said city and in the jurisdiction of the court in which the petition was made; and where it appears that the plaintiff formerly had a legal residence in Nassau county before he took an apartment in New York city and he states he had retained his domicile there and intended his occupation of an apartment in New York to be temporary and it appears he had continued to vote in Nassau county, and, before the commencement of the present action, had surrendered his apartment, dismissed his servants and moved his furniture back to Nassau county where he had frequently been since, held, that plaintiff must be deemed to have resided in that county within the meaning of section 984 of the Code of Civil Procedure when the action was commenced. Dresser v. Mercantile Trust Co., 18.

2. *Place of trial: Residence or domicile of parties — Corporations — Railroad company; Change of place of trial; Affidavits on motion — Probability that witnesses will testify as stated; Convenience of witnesses — What witnesses considered — Employees and experts.* — In an action to recover damages for personal injuries against a railroad company, the place of trial is properly laid in a county through which its road is operated, in which it owns property and has a place for the regular transaction of business. Upon a motion to change the place of trial for the convenience of witnesses, affidavits which state that the moving party expects to prove certain facts by the witnesses named, without stating or disclosing grounds showing that such facts can be proved by them, are insufficient. And where it appears that the plaintiff is a poor man and would be unable to transport his witnesses to the county where the accident happened and to which the place of trial is sought to be changed, and defendant's witnesses are all its employees except the expert witnesses, and to change the place of trial would practically defeat the plaintiff's cause of action, such change will not be ordered. Mole v. New York, Ontario & Western R. Co., 22.

3. *Place of trial — Residence or domicile of parties — Agent authorized to sue by Domestic Commerce Law* (*L.* 1902, *ch.* 482). — The place of trial of an action brought by an agent residing in Queens

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VENUE — Continued.
county against a defendant residing in Kings county cannot be properly laid in Madison county where the owner resides, pursuant to L. 1902, ch. 482, and the defendant may require the place of trial to be changed to Kings county. Walsh v. Maroney, 369.

VERDICT.
And findings — Special findings by the jury — Amendment — By court — Interest, when not added.—Where the jury finds a verdict for a certain amount and interest, without specifying the amount of the interest nor the date from which it is to be computed, and it was not clearly shown from what date interest should be computed, the court has not power to correct the verdict by adding a certain amount for interest. Schnaufer v. Ahr, 299.

WILLS.
1. *Interpretation and construction — Expenses of the estate, charges, etc.— Rules and implications — Implied charges on land.*— Where a testator, owning real estate, gives an annuity to his aged sister, but does not leave sufficient personal property to pay the annuity after the payment of his debts and funeral expenses, and it does not appear whether at the time the will was made the testator had sufficient personal property for such purpose nor how much, if any, will remain after paying debts and funeral expenses, and the will contains no expression making the annuity a charge upon the testator's real estate, and there are no extrinsic circumstances to aid the court in determining the testator's intent, and his language shows that he understood there would be personal property left after satisfying the bequest, held, that the will does not disclose an intention to charge the annuity upon testator's real estate. Robinson v. Kelso, 89.

2. *Interpretation and construction: Terms defining quantum or duration of estates or interests — Rules and implications — Words of inheritance or purchase — Gift over to "issue"; Administration of estate and execution of powers, etc.— Rules and implications — Power of one executor to execute power given to several.*— Where a testator devised his real estate to his executors in trust to apply the net income of the estate to the support of his wife, whom he appointed one of three executors and trustees, and authorized his executors, with his wife's consent, to sell and convey his real estate and required that such consent be set forth and appear before any sale should be valid and that no sale should be valid without the signature to the conveyance and acknowledgment of the execution of the same by his wife as executrix, held, that the power of sale could not be exercised by the wife alone, she being the only one of the executors and trustees to qualify, and that a title depending upon her attempted exercise of such power was not a marketable title. And where, in order to make good the defect, a deed from the remaindermen was tendered, it was held that such a deed could not cure the infirmity in the title, as the interest of the executrix herself as beneficiary of the trust was inalienable and would not pass by her deed as executrix or otherwise. And where the testator further provided that after the death of his wife his estate should be divided into four shares one of which he gave to each of his four children providing that, if any child should die before attaining his majority leaving no legal issue, the share of such child should go to the other children and further providing for distribution of the shares among the children by lot, or, in case any child objected, then, for a sale by the executors and trustees and a gift of the proceeds to his said children "or the legal issue of any or all of the same", one of the children who executed the deed tendered to perfect the title being a married son, whether his share was not liable to be divested

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WILLS — Continued.
by the birth of lawful issue and his death prior to the death of the executrix who was also the life tenant, *quære*. Hilton v. Sowenfeld, 152.

3. *The testamentary instrument or act — Execution of will — Evidence of execution — Publication and request.*— Where a statement was made by the testatrix that the paper she was about to sign was intended to be her will and a request was addressed by her to the witnesses to sign as such, before she actually affixed her signature; but, as part of the same transaction, she immediately signed her name and passed the paper over to the witnesses who then signed their names, a sufficient declaration and request of the testatrix appears. Matter of Gamber, 168.

4. *Interpretation and construction — Ademption, revocation and satisfaction — Extinction and substitution of specific property; Satisfaction of legacies — Gifts in lifetime.*— Where a testator gave his vessel property known as "Moran's Towing Line" to certain persons in certain proportions and soon after making his will organized a corporation named "Moran's Towing and Transportation Company," which took over such property, and the testator directed corporate stock to be issued in the names of such legatees, in varying amounts, held that the testator intended the corporate stock to pass under his will to the legatees named and that such amounts as had already been issued by his direction should be deemed advancements to the several legatees on account of their respective legacies. Matter of Moran, 169.

5. *Interpretation and construction — Terms creating legacies and gifts of income, interest, support, etc.— Particular words of doubtful meaning — Directions to use principal if necessary for support.*— Where a testator gave to his wife "the entire use of my real and personal property of whatever name and nature during her life, to draw on principal for her necessary support during life" and died, leaving a sister, two nephews and a niece to whom he gave legacies, held, that the testator intended his wife to have the entire use of his real and personal property for her support and maintenance during her life and, if that was insufficient for her necessary support, to draw upon the principal. Matter of Hibbard, 196.

6. *Interpretation and construction — General rules — Previous acts and understanding of parties.*— In a case where, by reason of the inartistic manner in which a will was drawn, it is impossible to say definitely whether it was the testator's intention to create a trust or to provide for the immediate payment of certain funds to the beneficiaries but where, upon the settlement of the executors' accounts, it was assumed that a trust was created and the decree was framed accordingly, this will be regarded as an election of the parties to construe the will as creating a trust; and the surrogate will follow such construction upon the death of one of the assumed trustees and entertain an application for the appointment of a substituted trustee in his place and a trustee in the place of the remaining trustee who desires to resign his trust. Matter of Oltmans, 208.

7. *Interpretation and construction — Conditions, contingencies and alternatives — Rules and implications — Intent to require election.*— Where a testator left legacies to the children of a deceased son and to a daughter, and the residue to another daughter with whom he lived, and declared that the legacies to his grandchildren and daughter were in payment of the distributive shares to which such legatees might be entitled in and to the residue of a certain life estate given the testator

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WILLS — Continued.
under the will of his late wife; and where it appeared that the will of testator's wife to whom he referred gave to him the net income of her entire estate for life and, at his death, to her three children, equally, with a provision that issue of a deceased child should take the parent's share, held, under the circumstances of the case, that the testator intended, by the provision in his will that the legacies therein mentioned should be in payment of the distributive shares of the legatees in his wife's estate, to refer only to such unexpended accumulation of net income from her estate as he might have at the time of his death and not to the gifts of the remainder of the capital of her estate contained in her will. Upon the settlement of both estates after the husband's death there should be allowed to his executors $150, under subdivision 5 of section 2713 of the Code of Civil Procedure, from his wife's estate. The executors of the husband's will are not to be charged with commissions upon his wife's estate until the decree is made settling her estate, as such commissions are not allowed until then. Matter of Pearce, 216.

8. *Interpretation and construction — Terms defining quantum or duration of estates or interests — Rules and implications — "Heirs" or "children" — Words of inheritance or purchase.* — Where a testator appointed two trustees to hold certain securities and re-invest the same when paid and pay the interest, one-fifth to his son and four-fifths to his grandson, the latter's interest to be paid for his support and education until he was twenty-one and after that to him directly; and the interest to be paid to the son and grandson during their natural lives; at the death of the son the whole interest to be paid to the grandson and at the latter's death the principal to be paid to his children if he should have any, and, if not, to the testator's granddaughter "or her heirs"; upon the judicial settlement of the accounts of the trustees after the death of the grandson without children, held, that the testator's granddaughter took a vested remainder in the fund upon the testator's death, the payment thereof to her only being postponed, and that such remainder was not divested by the death of the granddaughter prior to that of the grandson, the words "or her heirs" being equivalent to the words "and her heirs" and not denoting a limitation of the granddaughter's estate nor being words of substitution, importing that her heirs should take as purchasers, but that such remainder passed under the granddaughter's will upon her death subject to the beneficial use for life of the son and grandson of the original testator and on the grandson's death subject to the life use of the son; and, upon consent of the parties under such construction of the will, four-fifths of the principal will be paid over to the granddaughter's executor and one-fifth retained and the interest thereon paid to the son annually during his life. Matter of Allison, 222.

9. *Interpretation and construction; Designations and descriptions of persons, etc. — Rules and implications — Limitations upon death — Time referred to — Heirs; Terms defining the nature and quality of estates or interests — Future interests and vesting — Direction to convey, etc., at future time.* — Where a testator, after directing his executors to set apart and invest a specific sum in trust for the life use of a certain person and to pay the income to her annually after two years from his decease, directs the payment of the principal of the trust fund at her decease to the heirs of his body then surviving in equal shares, and he is survived by two daughters, the title to the trust fund does not vest until the death of the *cestui que trust*. Only one of testator's daughters having survived the *cestui que trust* she is entitled to one-half of the trust fund; and the son and granddaughter of a daughter of the testator who died before the *cestui que trust* are entitled, as living heirs

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WILLS — Continued.
of the testator, to the remaining one-half of the trust fund and the accumulated interest thereon in equal shares. Matter of Wilson, 238.

10. *Interpretation and construction: General rules — Subordination of language to intent; Designations and descriptions of property, funds, etc.— Particular terms of doubtful meaning — Corporate stock as including interest in mortgage.*—Where the intention of a testator appears clear, but his plan and definite purposes are endangered by inapt and incorrect modes of expression, the court should subordinate the language to the intention; and to get at the correct meaning it may reject words or limitations, supply or transpose them. About two weeks after the execution of his will testator died, owning 149 shares of corporate stock in a brewery of the par value of $1,000 each, and left him surviving his widow, who died ten years thereafter, a son and four married daughters. The will directed that as to twenty-one shares the son should receive the net income thereof during the life of the widow and that as to the remaining shares she should receive the income thereof during her life; that after her decease forty-five of the shares should go to the son absolutely and that the trustee should continue to hold the remaining shares in trust for ten years from "my decease" but in no event beyond the lifetime of the son, and "during the said period" the income on twenty-six shares should be paid to each of his daughters or in the event of their death to their lawful issue. The will further provided that the son should have the right, at or within one year after the expiration of "said ten years", to purchase the entire amount of stock set apart for the benefit of testator's daughters at par value. It further provided that, if the son should fail to exercise the option within one year after the expiration of the ten-year period, the stock set apart for the daughters should "belong to and be delivered to each of them at the expiration of said period of eleven years or upon the decease of my son, absolutely and as their own property, without any restriction whatever." Held, that the plain purpose of the testator was to give his widow during life all the income except what was to go to the son, and for ten years after her death to give the daughters or their issue the income on twenty-six shares each, and that the 104 shares might then be transferred at par to the son who would, in the meanwhile and subsequently to his mother's death, absolutely own forty-five shares in ris own right; and that, as said provisions were inconsistent and conflicting only on the assumption that the testator meant "my decease" and not "her decease," all ambiguities would be eliminated and effect given to the design of the testator by substituting "her" for "my"; and that the son's option could not be exercised until ten years after his mother's death. It appearing that, previous to the incorporation of the brewing company, the parties conducted the same business as copartners and a bond and mortgage of $150,000 was given in part payment for the transfer to the corporation of the copartnership property it was clear that the testator regarded his interest in said bond and mortgage as a mere incident to his stock; that they were inseparable, and that his disposition thereof was intended to embrace a pro rata interest in his one-half of the bond and mortgage. There being but two lives specified, the lives of the mother and son, during which the absolute ownership of the property was suspended, the Statute against Perpetuities had not been offended. Liebmann v. Liebmann, 488.

11. *Interpretation and construction: Terms defining the nature and quality of estates or interests — Future interests and vesting, etc.— Direction to convey, deliver, transfer or pay over to beneficiary at future time, Estates subject to powers; Administration of estate and*

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execution of powers and trusts, etc.— Particular terms of doubtful meaning — Majority authorized.— The provision of the Real Property Law (L. 1896, ch. 547, § 49) that all expectant estates are descendible, devisable and alienable in the same manner as estates in possession does not prevent a testator from making an expectant estate subject to be defeated by the exercise of a power of sale given to trustees to be exercised before the owner of the expectant estates becomes vested with the absolute title. No rule of law prevents a testator from empowering trustees to act by a majority of their number. Where one of five trustees becomes a lunatic, the remaining trustees cannot act as the survivors might do in case of the death of one of their number, but it is the duty of the lunatic's cotrustees to apply for his removal and for the appointment of another in his stead. After a devise and bequest of testator's residuary estate to five executors, or the majority of them, in trust for specific uses and purposes during the lives of testator's four children, with a discretionary power of sale, the will provided: "I will and direct that the net income of one other fourth part and share of my estate be paid annually (or oftener in the discretion of my executors and trustees) by my said executors and trustees, to my son, * * * so long as he shall live for his support and maintenance. Upon the death of my said son * * * they shall pay over the said one-fourth part of my estate to the lawful children of the body of said * * * then surviving, and to the children or descendants of any deceased child of him then surviving, share and share alike, to their own use forever, the children or descendants of any such deceased child, however, to together take only what their parent would have taken if living at the death of said * * *. Should any of said beneficiaries be infants at that time, then their portion shall be paid to them as and when they shall severally reach the age of 21 years, the income meantime to go to their support severally. In case my said son * * * shall die leaving no child of his body nor any descendants of any such child him surviving, then I give, devise, and bequeath the said one-fourth share of my estate (the income of which is hereinbefore devised for his support) unto my other children surviving at his decease and to the children or descendants of any child of mine then deceased, share and share alike, to their own use and benefit, the children or descendants of any such deceased child, however, to take together only the portion which their parent would have taken, if living at the death of said * * *. Should any of such beneficiaries be minors, then their portions shall be paid to them severally on their severally reaching the age of 21 years, the income meantime to go to the support of such minors severally." A separate clause for each of the other children made substantially the same directions, but by a variety of expression. In an action brought for the construction of the will, upon the death of the only daughter, and to determine the claims of her children to their share in the estate. Bascom v. Weed, 496.

12. *Probate, establishment and annulment — Probate — Recording exemplified copy of foreign will — Procedure — Evidence.*— Under the provisions of the Code of Civil Procedure for recording foreign wills (§§ 2703, 2704), where it appears by the petition that real property situated within the State was devised by a will which has been admitted to probate within another State where the testator resided and filed or recorded in the proper office as prescribed by the laws of that State; and where it also appears by the petition and the copy of the will thereto annexed that the will has been executed in conformity with the laws of this State, the will should be ordered to be recorded, although the proof of its execution rests upon the testimony of a single witness. Matter of Coope, 509.

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